SUPREME COURT OF THE UNITED STATES.

No. ~~105~~. 76.

CHARLES DERBY AND FRANKLIN O. DAY, PLAINTIFFS IN ERROR,

vs.

CHRISTOPHER M. GALLUP.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

GOVERNMENT PRINTING OFFICE.

2337

SUPREME COURT OF THE UNITED STATES.

No. 189.

CHARLES DERBY AND FRANKLIN O. DAY, PLAINTIFFS IN ERROR,

vs.

CHRISTOPHER M. GALLUP.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

INDEX.

	Original.	Print.
Writ of error	1	1
Citation and service	3	1
Summons	5	2
Complaint	6	2
Answer	12	5
Reply	18	8
Verdict	23	10
Judgment	24	11
Bill of exceptions	25	11
Deposition of C. W. Griggs	25	11
Deposition of C. M. Gallup	40	18
Deposition of G. W. Prescott	50	22
Deposition of C. Derby	55	25
Deposition of C. W. Gregg	62	28
Deposition of Wm. Wood	67	30
Deposition of C. M. Gallup	70	31
Deposition of W. B. Gere	72	32
Deposition of J. Lemay	74	33
Deposition of A. V. Brown	75	34
Deposition of J. C. Raguett	76	34
Deposition of C. P. Longford	79	36
Appeal	90	40
Bond	91	41
Clerk's certificate	93	42
Final judgment	94	42
Clerk's certificate	97	44

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the supreme court of the State of Minnesota, greeting:

Because that in the record and process, and also in the rendering of judgment in a suit before you, between Charles Derby and Franklin O. Day, plaintiffs in error, and Christopher M. Gallup, defendant in error, in a civil action, a manifest error has intervened to the great damage of the said plaintiffs in error, as in their complaint has been stated, and it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid, in this behalf, you are hereby commanded that if judgment thereof be given, then, under your seal, you do distinctly and openly send the record and process in the suit aforesaid, with all things concerning them, and this writ, so that you have the same before the chief justice and the associate justices of the Supreme Court of the United States on the first Monday of December next, at Washington, being the present seat of the national government, that the record and process aforesaid being inspected, they may cause to be done thereupon

2 what of right ought to be done.

Witness the honorable Roger B. Taney, chief justice of the the said Supreme Court, this third day of September, in the year of our Lord one thousand eight hundred and sixty-two, and of the independence of the United States the eighty-seventh.

JAMES W. TAYLOR,
Clerk of the Circuit Court of the United States
for the District of Minnesota.

3 UNITED STATES OF AMERICA, *ss:*

To Christopher M. Gallup, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Minnesota, wherein Charles Derby and Franklin O. Day are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Lafayette Emmett, chief justice of the said supreme court of the State of Minnesota, this third day of September, in the year of our Lord 1862.

L. EMMETT, *Ch'f Justice.*

4 State of Minnesota, supreme court. Charles Derby and Franklin O. Day, pl'ffs in error, *vs.* M. Gallup, def't in error. Citation. Due service of the within, by copy, admitted this 3d day of September, A. D. 1862. Geo. L. Otis & E. A. Otis. Filed Sep. 3d, 1862. A. McElrath, dep. clerk, sup. court. Allis & Peckham, att'ys of pl'ffs in error.

5 State of Minnesota, district court, 2d judicial district, Ramsey county.

CHRISTOPHER M. GALLUP
against
CHARLES DERBY, FRANKLIN O. DAY, WILLIAM B. GERE and LORENZO ALLIS. } Summons for relief.

In the name of the State of Minnesota, to Charles Derby, Franklin O. Day, Wm B. Gere, and Lorenzo Allis, above-named defendants.

You and each of you are hereby summoned and required to answer the complaint in this action, a copy whereof is herewith served on you, and to serve a copy of your answer to the said complainant on either of the subscribers at their offices in St. Paul, Minnesota, within twenty days after the service of this summons upon you, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid, the plaintiff in this action will apply to the court to have his damages assessed by a jury, or the amount he is entitled to recover ascertained by the court, and will take judgment for the amount so assessed or ascertained, together with the costs and disbursements in this action.

M. E. AMES, with
GEO. L. & E. A. OTIS,
Pl'ff's Att'ys.

6 State of Minnesota, Ramsey county, district court for 2d judicial district.

CHRISTOPHER M. GALLUP
vs.
CHARLES DERBY, FRANKLIN O. DAY, WM. B. GERE, and LORENZO ALLIS. } Complaint.

The complaint of the plaintiff in this action respectfully shows to this court that heretofore, viz., on the 15th day of August, A. D. 1859, at the city of St. Paul, in Ramsey county, in Minnesota, the said defendants, Charles Derby, Franklin O. Day, Wm B. Gere, and Lorenzo Allis, wrongfully and forcibly broke and entered into the store owned and occupied by this plaintiff, and took from his possession the following goods, wares, merchandise, chattels, and personal property of the plaintiff, that is to say, eleven barrels of pork of the value of two hundred and seventy-five dollars; twenty-nine sacks of coffee of the value of nine hundred and fifty-seven dollars;

seventy-four kegs of nails of the value of five hundred and eighteen dollars; five ten-gallon kegs of sugar-house molasses of the value of thirty-seven dollars and fifty cents; five ten-gallon kegs of golden sirup of the value of fifty dollars, and fifteen boxes of star candles of the value of one hundred and fifty dollars, amounting in the aggregate to the value of nineteen hundred and eighty-seven dollars and fifty cents, which said goods, wares, merchandise, and personal
7 property was then and there the property of this plaintiff, and that the said defendants took and carried away the same then and there and converted to their own use.

This plaintiff further shows that at the time and place aforesaid he was engaged in the general grocery business; that the said goods, wares, merchandise, and chattels so taken by the said defendants from him, composed a portion of his stock in trade in said grocery business; that all the same were staple articles, and are constantly in demand, and are readily salable for cash, and were of the full value of nineteen hundred and eighty-seven dollars and fifty cents; and that by reason of the aforesaid taking of the said goods, chattels, and merchandise from him, and the conversion thereof to their own use by the said defendants, this plaintiff has been compelled to purchase new supplies of goods at great expense at unfavorable seasons of the year for purchasing goods; that the assortment of his said stock in trade has been broken up, and thereby the value of the remainder of his said stock in trade has been greatly depreciated, and that he has sustained damages thereby in the further sum of one thousand dollars; that the defendants neglect and refuse to pay to him the said sum of nineteen hundred and eighty-seven dollars and fifty cents, the value of said goods as aforesaid, or any part thereof, or the said sum of one thousand dollars damages by him sustained on account of the
8 aforesaid taking of the same by the defendants, but are now, each of them, justly indebted to him therefor in the full sum of twenty-nine hundred and eighty-seven dollars and fifty cents.

For another and further cause of action, this plaintiff respectfully shows to this court that heretofore, viz., on the 18th day of August, A. D. 1859, the said defendants, Charles Derby, Franklin O. Day, Wm. B. Gere and Lorenzo Allis, at the city of Saint Paul, in Ramsey county, in Minnesota, again unlawfully and forcibly broke and entered into the store owned and occupied by the plaintiff, and took from his possession the following other goods, wares, merchandise, and personal property of this plaintiff, viz: seventy-four kegs of nails of the value of five hundred and eighteen dollars; three ten-gallon kegs of golden sirup of the value of thirty dollars; five ten-gallon kegs of sugar-house molasses of the value of thirty-seven dollars and fifty cents; nine boxes of star candles of the value of ninety dollars; six boxes of gold-leaf tobacco of the value of five hundred and four dollars; two boxes of diadem twist tobacco of the value of thirty dollars; two boxes of ace-of-trumps tobacco of the value of thirty dollars; two boxes of brown-dick tobacco of the value of one hundred and four dollars; seven chests of tea of the value of three hundred and sixty-seven dollars and fifty

cents; ten chests of tea of the value of seven hundred dollars; two barrels of powdered sugar of the value of one hundred dol-
9 lars; and six barrels of whiskey of the value of one hundred and twenty-five dollars, amounting in all to the aggregate value of two thousand six hundred and thirty-six dollars; and which said goods, wares, merchandise, and chattels were then and there the property of this plaintiff, and that the said defendants then and there took the said goods, wares, merchandise, and personal property, and carried away the same and converted it to their own use.

This plaintiff further shows that at the time last aforesaid he was engaged in the general grocery business in St. Paul, in Minnesota, and that the said goods, wares, and merchandise so taken from him by the said defendants as last aforesaid, composed a portion of his stock in trade in said grocery business, and that all of the same are staple articles, and are constantly in demand, and are readily salable for cash; that the same are of the full value of two thousand six hundred and thirty-six dollars as aforesaid, and that by reason of the said taking of the said goods by the defendants, and the conversion thereof to their own use, this plaintiff has been compelled to purchase new supplies of goods at great expense; that his assortment of goods has been broken, and the residue of the said goods in his said store have thereby greatly depreciated in value, and that the plaintiff has been thereby greatly injured in his said grocery business; and by
10 reason of the acts and grievances hereinbefore complained of this plaintiff was and is greatly injured and damaged in his credit in the cities of New York, St. Louis, Chicago, St. Paul, and elsewhere, in the sum of one thousand dollars; that the said defendants, and each of them, have hitherto and do still neglect and refuse to pay to this plaintiff the said sum of two thousand six hundred and thirty-six dollars, the value of the said goods, wares, and merchandise so taken by them as aforesaid, or any part thereof, and have hitherto and still do neglect and refuse to pay to this plaintiff the sum of one thousand dollars, the damages by him sustained on account of the said unlawful taking of the aforesaid goods from him, or any part thereof, but are each and every one of them now justly indebted to him thereon in the sum of three thousand six hundred and thirty-six dollars. Wherefore the plaintiff demands judgment against the said defendants, and each of them, in the sum of six thousand six hundred and twenty-three dollars and fifty cents, besides his costs in this action.

Saint Paul, Sept. 26, 1859.

M. E. AMES, with
GEO. L. & E. A. OTIS,
Pl'ff's Att'y.

11 RAMSEY COUNTY, *ss:*

I hereby certify and return that on the 28th day of Sept., A. D. 1859, I personally served the within summons and complaint upon the within-named defendant, Lorenzo Allis, by giving to him a certified copy of the same, at St. Paul, in said county. I further certify and return that on the 30th day of Sept., A. D. 1859, I

personally served the within upon one of the within-named defendants, Wm. B. Gere, by giving to him a certified copy of the same, at St. Paul, in said county.

J. Y. CALDWELL, *Sheriff*,
By A. B. BRACKETT, *Deputy*.

My fees and service	$4 00
Copies	8 00
Mileage	40
	12 40

RAMSEY COUNTY, *ss:*

I hereby certify and return that on the 4th day of October, A. D. 1859, I served this summons and complaint upon Charles Derby, one of the within-named defendants, by giving to him, personally, a certified copy thereof, in the city of Saint Paul, in said county of Ramsey.

JAS. Y. CALDWELL, *Sheriff*,
By GEO. W. TURNBULL, *Deputy*.

My fees and service	$2 00
Copies	4 00
Mileage	40
	6 40

12 District court, second judicial district.

RAMSEY COUNTY:

CHRISTOPHER M. GALLUP
against
CHARLES DERBY, FRANKLIN O. DAY, W. B. GERE, and LORENZO ALLIS.

The separate amended answer of the defendants, Charles Derby, Franklin O. Day, and Wm. B. Gere, to the complaint of the plaintiff in above-entitled action, respectfully shows to this court that the said defendants deny, generally and specifically, each and every allegation in said complaint contained. And, for a further defence, these defendants show that on or about the thirteenth day of August, 1859, Charles Derby and Franklin O. Day, two of the above-named defendants, who were then citizens of the State of Missouri, commenced their certain action in the district court of the United States for the district of Minnesota, against one Chauncy W. Griggs, who was then, and still is, a citizen of the State of Minnesota, for demand of more than five hundred dollars, by causing to be issued by the clerk of said court, out of and under the seal of said court, a certain writ or summons, directed to the marshal of the said court for the district of Minnesota, commanding him, the said marshal,

13 to summon the said Chauncy W. Griggs to be and appear in the said court on the said 13th day of August, 1859, to answer to the said Derby and Day, of a plea of trespass on the case upon premises; that said summons was delivered to the said marshal, and by him personally served on the said Chauncy W. Griggs, on the said 13th day of August, 1859, and that the said Chauncy W. Griggs duly appeared in said action; that the said court had jurisdiction of the subject-matter of said action and of the parties thereto. That at the time of commencing said action, and for a long time previous thereto, the said Chauncy W. Griggs had been, and was, indebted to these defendants, Charles Derby and Franklin O. Day, for certain goods, wares, and merchandise, sold and delivered by said Derby and Day to said Griggs, and at his, said Griggs's special instance and request, on or about the 23d day of June, A. D. 1859, at the city of St. Louis, State of Missouri, in about the *the* sum of five hundred and twenty-five dollars, and that said action was commenced to recover said sum, that being the price for which said goods were sold. The amended answer of these defendants further shows, that at the time of commencing said action, the said plaintiffs therein, Charles Derby and Franklin O. Day, who are also defendants herein, duly filed in said action, the certain affidavit of Charles Derby, one of the said plaintiffs, with the clerk of said court, showing, among other

14 things, that the said action was to recover the price and value of certain goods, wares, and merchandise. That the said plaintiffs had sold and delivered to the said Chauncy W. Griggs, and at his special instance and request, on or about the 23d day of June, A. D. 1859, at St. Louis, in the State of Missouri, the said goods, wares, and merchandise, at and for the price of five hundred and twenty-five $\frac{25}{100}$ dollars, and which said defendant, Chauncy W. Griggs, had promised to pay, but, though often requested, had neglected and refused so to do, and praying, for the reasons therein contained, that an attachment should issue against the property of the said Chauncy W. Griggs, defendant therein, and on which said affidavit the following indorsement was made by the Hon. R. R. Nelson, judge of the said court, to wit: "Upon reading and filing the within affidavit, let an attachment issue in accordance with the rules of the U. S. dis't court. R. R. Nelson, U. S. dis't judge." That thereupon the said plaintiffs, Charles Derby and Franklin O. Day, having filed their certain bond in said action, approved by the said R. R. Nelson, judge as aforesaid, in accordance with rules of said court, a writ of attachment was duly issued in said action, out of and under the seal of the said district court of the U. S. for the district of Minnesota, on the 13th day of August, A. D. 1859, and tested

15 on that day, directed to the United States marshal for the district of Minnesota. That the defendant herein, William B. Gere, then was and still is U. S. marshal for said district of Minnesota. That, by the said writ, the said marshal was commanded to forthwith attach and safely keep all the property of the said Chauncy W. Griggs within his district, or so much thereof as should be sufficient to satisfy the demand of the said plaintiffs, Charles Derby and

Franklin O. Day, and the costs of the said action, and to hold the same, subject to the order of the said court, to abide the final judgment in said action, and of the said writ to make due return, upon the execution thereof, to the office of the clerk of said court. That the said writ of attachment was duly delivered to the said marshal, William B. Gere, defendant herein, on the day of the issuing thereof. That under and by virtue of said writ, and under the direction of the plaintiffs therein, the said marshal, William B. Gere, defendant therein, did, on the 15th day of Aug., at St. Paul, levy upon, take, and carry away, under and by virtue of said writ, certain goods, wares, and merchandise, as the property of the said Chauncy W. Griggs, but whether the said property was the same as is described in the complaint herein these defendants have no knowledge or information sufficient to form a belief, and cannot state. That the said taking was the same taking and trespass in the said complaint
16 first charged and described. That neither the said marshal nor any of these defendants did retain the said property, or convert the same to their own use, for that, forthwith, on the same day, the said plaintiff herein, forcibly and violently resisting the said marshal and the execution of the process or writ of attachment aforesaid, did forcibly retake all and singular the property which the said marshal had so taken from and out of the possession of the said marshal, and did retake and carry away the same, and convert the same to his own use. That thereupon, and on the eighteenth (18th) day of August, 1859, the said marshal, Wm. B. Gere, under and by virtue of the said writ as aforesaid, and under the direction of the plaintiffs therein, did, secondly, levy upon and take into his possession, at St. Paul, as and for the property of the said Chauncy W. Griggs, the following goods, wares, and merchandise, and none others, to wit, seventy-four kegs of nails, six barrels of whiskey, two barrels of sugar, seventeen half chests of tea, nine boxes of star candles, three kegs of golden sirup, five kegs of sugar-house molasses, six boxes of gold-leaf tobacco, two boxes of brown-dick tobacco, two boxes of diadem twist tobacco, and two boxes of "ace-of-trumps" tobacco. And on the same day the said marshal, Wm. B. Gere, made due return to said writ, and filed the same in the office of the
17 clerk of said court, according to the exigency of the said writ, which said taking is the same taking secondly referred to in the said complaint herein. That all the property so taken as aforesaid was the property of the said Chauncy W. Griggs. That the said goods so taken as aforesaid were of the value of six hundred dollars, and no more. The amended answer of these defendants further shows that such proceedings were afterwards had in said action; that on the 10th day of September, 1859, final judgment was rendered by the said district court of the United States, in and for the district of Minnesota, in favor of the said Charles Derby and Franklin O. Day, and against the said Chauncy W. Griggs, for the sum of six hundred and fifty-six dollars and twenty-seven cents, and duly docketed in the office of the clerk of said court on the same day; that execution was duly issued on said judgment, out of and under

the seal of the said court, directed to the said Wm. B. Gere, marshal as aforesaid, and the said goods sold by the said marshal for the satisfaction thereof; that the said goods and every part thereof, at the time of the said taking, were the property of the said Chauncy W. Griggs. Wherefore, defendants pray to be hence dismissed with their costs in this behalf incurred.

18 ALLIS & PECKHAM,
Att'ys for Def'ts, Charles Derby, Franklin O. Day, and William B. Gere.

Indorsed: Due service of a copy of the within answer on us this 9th day of April is admitted. G. L. E. A. Otis & M. E. Ames, pl'ff's att'ys. Filed July 19, 1860. R. F. Houseworth, clerk.

District court, second judicial district.

STATE OF MINNESOTA,
County of Ramsey:

CHRISTOPHER M. GALLUP
against
CHARLES DERBY, FRANKLIN O. DAY, WILLIAM B. GERE, and LORENZO ALLIS.

The reply of the plaintiff to the separate amended answer of the defendants, Charles Derby, Franklin O. Day, and William B. Gere, respectfully states and shows to this court, that the plaintiff denies that on the day of the taking of the said goods and chattels in said answer mentioned, or at any other time, he, the plaintiff, forcibly or violently, or otherwise, resisted the said marshal, William B. Gere, or the execution of the writ of attachment described in said
19 answer, and denies that he forcibly retook said property from the said marshal, or carried away or converted the same to his own use, as is alleged in said answer, or otherwise. The plaintiff, further replying, denies that the said property, goods, and chattels, described and mentioned in the said amended answer, and taken by the defendant, William B. Gere, or any part or portion thereof, were the property of Chauncy W. Griggs, therein mentioned, at the time of the taking and carrying away of the same, as therein mentioned.

The plaintiff, further replying, denies that afterwards, on the 18 day of Sept., A. D. 1859, or at any other time, any final, valid or legal judgment was duly or legally rendered, entered or docketed in said suit, in the answers described by the said district court of the United States, in and for the district of Minnesota, in favor of the said Charles Derby and Franklin O. Day and against the said Chauncy W. Griggs, for the sum of six hundred and fifty-six dollars and twenty-seven cents, or any other sum. And denies that any execution was duly or legally issued, on said supposed judgment, out of or under the seal of said court, directed to the said William B. Gere, marshal, as stated in said answer, and denies that any valid or legal judgment whatever was rendered, or execution issued, or that the said goods were legally seized or sold under or upon said supposed execution, or any *or any* execution, by the said marshal as is

20 stated in the said amended answer. The plaintiff further avers that the said goods, wares, and merchandise mentioned and described in the said complaint were of the full value and amount in the said complaint stated. The plaintiff further denies that the said property, goods, wares, and merchandise, or any portion thereof, mentioned in the said complaint, were, at the time of the said taking, the property of the said Chauncey Wm. Griggs, but, on the contrary, avers that the same and every part and portion thereof, were, at the time of the said taking and conversion complained of in the said complaint, the sole and exclusive property, goods and chattels, of the said plaintiff, and in his actual exclusive possession.

Wherefore the plaintiff demands judgment as in the said complaint.

M. E. Ames with G. L. & E. A. Otis, pl'ffs att'ys, Saint Paul, April 23rd, 1860. Due service of the within reply is hereby admitted this 24 day of April, 1860.

ALLIS & PEEKHAM,
Def'ts' Att'ys.

Filed July 19, 1860.

R. F. HOUSEWORTH, *Clerk.*

District court, general term, 37th day, Monday, June 18, A. D. 1860. Court opened pursuant to adjournment, Judge E. C. Palmer, presiding.

21 C. M. GALLUP
vs.
CHRISTOPHER DERBY, FRANKLIN O. DAY, WM. B. GERE, and LORENZO ALLIS.

Ordered, by consent, that this cause be and the same is hereby dismissed as to defendant Wm. B. Gere, without costs to either party.

CHRISTOPHER M. GALLUP
vs.
CHARLES DERBY, FRANKLIN O. DAY, and LORENZO ALLIS.

This cause this day came on for trial, and the following jurors from the regular panel were empanelled and sworn to try the same, to wit: E. W. Eddy, J. B. Hern, Wm. Welch, J. J. Salter, Fred. C. Maltby, M. J. Clum, P. W. Nicols, Henry Justice, J. W. Selby, J. B. Melancon, Henry Webber, and N. Spicer. C. W. Griggs was sworn and examined as a witness for the plaintiff. A bill of sale from Griggs to Gallup was received in evidence for plaintiff. C. M. Gallup was then sworn and examined as a witness for the plaintiff.

Ordered, that court stand adjourned until to-morrow, at 9 o'clock a. m.

A true record. Attest:

R. F. HOUSEWORTH, *Clerk.*

District court, general term, 38th day, Tuesday, June 19, A. D. 1860.

Court opened pursuant to adjournment, Judge E. C. Palmer, presiding.

22 CHRISTOPHER M. GALLUP
vs.
CHARLES DERBY, FRANKLIN O. DAY, and LORENZO ALLIS.

In this cause this day again came the parties by counsel, and the jury, and this trial was resumed. Whereupon W. B. Gere was sworn and examined as a witness for the pl'ff; and Joseph Lomay, Geo. W. Prescott, Geo. A. Emmell, Wm. C. Gray, A. Vance Brown, J. C. Raguet, and Geo. T. Temple were sworn and examined as witnesses for the defendants.

Ordered that court stand adjourned until to-morrow, at nine o'clock a. m.

A true record. Attest:

R. F. HOUSEWORTH, *Clerk.*

District court, general term, 39 day, Wednesday, June 20, A. D. 1860.

Court opened pursuant to adjournment, Judge E. C. Palmer, presiding.

CHRISTOPHER M. GALLUP
vs.
CHARLES DERBY, FRANKLIN O. DAY, and LORENZO ALLIS.

23 In this cause this day again came the parties by counsel, and the jury, and this trial was resumed. Charles Derby and N. P. Langford were sworn and examined as witnesses for the def'ts. E. A. Otis was sworn as a witness for the plaintiff. After argument by counsel and the charge by the court, the jury retired to consider their verdict, which they rendered into court in writing, as follows: "Christopher M. Gallup *vs.* Charles Derby, Franklin O. Day, partners as Derby and Day, and Lorenzo Allis. The jury empanelled and sworn to try the issue in the above action find a verdict in favor of the plaintiff, and against the def'ts, Derby & Day, and Lorenzo Allis, for the sum of fifteen hundred and seventy-six dollars and ninety-eight cents, ($1,576\ \frac{98}{100}$) P. W. Nicols, foreman." Upon rendition of verdict by the jury, Mr. Bigelow, for def'ts, gave notice of a motion for a new trial.

I, R. F. Houseworth, clerk of the said court, hereby certify that the foregoing is a true transcript from the records of court.

Attest:

R. F. HOUSEWORTH, *Clerk.*

State of Minnesota, district court, second judicial district, Ramsey county.

C. M. GALLUP
against
CHARLES DERBY, FRANKLIN O. DAY, and LORENZO ALLIS.

24 The verdict of the jury in this cause having been duly rendered, whereby the find for they plaintiff, and assess his damages at fifteen hundred and seventy-six $\frac{88}{100}$ dollars: Now, on motion of G. L. & E. A. Otis, plaintiff's att'ys, it is hereby adjudged that the plaintiff, Christopher M. Gallup, recover of the defendants above named the sum of one thousand five hundred eighty-six $\frac{18}{100}$ dollars, the amount of verdict and interest, with forty-two and $\frac{55}{100}$ dollars costs, amounting to $1,628 73.

Dated July 19, 1860.

R. F. HOUSEWORTH, *Clerk.*

Amount of verdict		$1,576 98
Interest on "		9 20
		$1,586 18
For proceeding before notice of trial	$2 00	
Jury fees	3 00	
Sheriff fees	6 30	
Witness fees	15 00	
Clerk's fees	6 00	
One affidavit	25	
		42 55
		$1,628 73

District court, 2nd district, Ramsey county.

CHRISTOPHER M. GALLUP
against
DERBY & DAY, and LORENZO ALLIS.

25 This cause came on to be heard on the eighteenth day of June, A. D. 1860, before the Hon. E. C. Palmer, justice, and a jury. The plaintiff, to maintain the issue on his part, call as a witness Chauncy W. Griggs, who, being sworn, testified:

In the summer of 1859 I resided in St. Paul, and was in the grocery business up to July 18, 1860. I had a store in St. Paul. I know the plaintiff in this suit. The witness was here handed a bill of sale, and asked to examine it. He testified: It is a bill of sale made by me to C. M. Gallup. It was made at the time it bears date. The bill of sale was then offered in evidence. It was a bill of sale by witness, bargaining and selling the goods specified in an inventory

attached, and with a clause of warranty. The witness then said, I have read the inventory attached. It is a true inventory of the goods I sold. The inventory comprised the goods described in the complaint, except the item of six kegs of gold-leaf tobacco, which was not included in the inventory. I received on that sale about $440 cash, one note for $1,000, payable in 30 days, note for $2,000, payable in 5 months, note for $1,060, payable in 7 months, note for $2,000, payable in 9 months, note for $3,000, payable in 12 months with interest, note for $446 and interest, payable in two years. Witness being shown a note for $1,000, says it has been paid;
26 $325 was paid July 20th, 1859; $359 18 Aug. 4th, 1859, and the balance Aug. 22d, at its maturity. The note offered in evidence, and marked "B." It was a note made by C. M. Gallup to witness, dated July, 1859, for $1,000, at 30 days. Witness, on being shown a note of Gallup, of same date, for $1,061 83, payable seven months from date, testified it was one of the notes given. It was paid Nov. 4th, 1859, *i. e.*, before maturity. I now hold the note of $2,000, at nine months. I received on that note, June 16th, 1860, $114 $\frac{45}{100}$. On the $2,000 note, payable in 5 months, $500 of it was paid at maturity. I transferred the note in July or August, 1859, to Chauncy Griggs, of Tollon, Connecticut. All these notes were in payment for the goods mentioned in the bill of sale. That bill of sale comprised all the goods I had in St. Paul. After the sale Gallup took possession, and continued in possession after that date to the present time, and is now in possession, trading and carrying on business. I know of goods being taken from the store August 18th, 1859, by Wm. B. Gere. He took 74 kegs of nails, 68 of them worth $4 50 per keg, and six of them worth $6 per keg—in all, $342; three ten-gallon kegs of golden sirup, worth $9 00 per keg; five ten-gallon kegs sugar-house molasses, $6 56 per keg; nine 40 lbs. boxes
27 of star candles, worth $8 65 per box; six boxes of gold-leaf tobacco, containing 120 lbs. each, worth $36 00 per box; two boxes of diamond twist tobacco, containing 20 lbs. each, worth $8 00 per box; two boxes of ace-of-trumps tobacco, containing 20 lbs. in each box, worth $7 60 per box; two boxes of brown-dick tobacco, 65 lbs. each, worth 55 cents per lb.; seventeen chests of tea, thirteen of them containing from 56 to 60 lbs. net, worth 55 cts. per pound; four containing same amount, worth 60 cts. per lb.; two barrels of powdered sugar, containing 250 to 260 lbs. each, worth 13 cents per lb.; six barrels of whiskey, 40 to 42 gallons in each barrel, worth 33 cents per gallon. At the time the goods were taken they were in Gallup's store, corner of Fort and St. Anthony streets, in St. Paul. I was present at the time they were taken; Wm. B. Gere took them; I think Mr. Allis was present; I think there was some conversation between Gere and Allis; Mr. Allis said to Mr. Gere he had better take enough teas, as there was considerable expense in taking them; Gere took the goods away; Gallup was also present; he told Gere the goods were his, and forbid his taking them. I estimated the value of these goods at the lowest wholesale price for which we sold them; the retail price was then, and now, 25 per cent. higher. The

28 court here called the attention of counsel for plaintiff to the fact of there being two causes of action stated in the complaint—one for a taking on the fifteenth, and one for a taking on the eighteenth of August—and asked counsel on which he meant to rely. Counsel replied, We do not go for the value of the goods taken the fifteenth, but we go for damages; we go the second; the goods first taken was returned. Counsel for the defence then remarked, "Then you waive the first cause?" to which pl'ff's counsel replied, Why, we have given no evidence under it. The witness then further testified, none of the goods taken on the 18th of Aug. were ever returned to plaintiff. The plaintiff's counsel now offered to prove by the witness the facts stated in the complaint, as the ground of special damages to the plaintiff, beyond the value of the goods taken. Objected to by defendants' counsel. Objection sustained; to which the pl'ff's duly excepted. I have been in St. Paul some four years; had been in the grocery business nine months just previous to my making this sale; I was not in partnership with Mr. Wood; I know one William Wood, but was never in partnership with him. Def't here offers to prove by the witness, that at the time of the making the bill of sale, the said William Wood was a silent partner of witness, and part owner
29 of the goods mentioned in the bill of sale. Obj. to by pl'ff as immaterial, and obj. sustained, and defendant excepted.

The witness continued: The plaintiff is a brother-in-law of mine. Plaintiff has now been here a year or a little upwards; at the time of the bill of sale plaintiff had been here about two months. I was solvent at the time. I made this sale at the time the bill of sale bears date. I made an affidavit for the purpose of having an attachment dissolved in a case of Derby and Day against me. At the time I made this sale, Gallup was boarding at the American House. He boards with me now. I think he has boarded with me about 7 or 8 months. I had a conversation with Mr. Derby about the 15 or 16 of August. I did not in that conversation, in answer to any question of Mr. Derby's as to why I sold out, answer that I could not help it—my creditors would ruin me; did not, in answer to a question of Mr. Derby as to what creditors, reply, some old debts. Did you, in answer to a question of Mr. Derby if they were pushing you, reply, no, but I feared they would?

Q. Did you, in answer to a question of Mr. Derby whether it would not have been better to have tried to compromise with your creditors, answer, I know my own business best?

30 Ans. I don't know. Did not tell Mr. Derby that I had not applied any of the proceeds of my sale to the payment of my St. Louis creditors. I did not reply to a question of Mr. Derby's, if I did not think it hard on those of whom I had bought staple goods on short time to use the entire proceeds in payment of old claims, with nothing left to pay them, that I could not help it. I made no offer to compromise to Derby, but I offered land and Ramsey county bonds. Did not offer Derby Ramsey county bonds, and tell him I could get them of a friend; did not say to Derby as to the balance of what I owed him, he would have to wait until I could work and

earn it, that I was young, and intended to pay all I owed. I did not take the bill of sale to be recorded, and had nothing to do with it, nor the filing thereof. Derby asked me why Gallup had the bill of sale recorded, and I replied because it is customary to do so. I had purchased some of the goods mentioned in the bill of sale within sixty days preceding the bill of sale, perhaps $2,500 worth, and perhaps $1,000 worth. I purchased a bill of goods of January & Co., St. Louis, within sixty days. I should think it was about $1,800 worth of goods within sixty days of sale. I purchased goods of Robert Chase, of St. Lewis. Had purchased a bill of goods of Derby & Day, of St. Lewis, within sixty (60) days. I think I purchased
31 of Robert Chase at the same time I bought of Derby & Day; I paid January & Co. $1,000; I think the payment was on old account. At the time I made this purchase of January & Co., I owed them, for past purchases, $1,000 or $2,000: I think there was no specified time of credit with January & Co.; I think it was 3 or 4 months; I got the goods also from Derby & Day on credit; I purchased of William C. Gray $700 worth of pork; I bought the pork of Gray within twenty days of the sale to Gallup; the pork was bought on 30 days' credit; I did not pay for the pork at the expiration of the thirty days; I have since paid Gray in full; I gave him levee bonds and notes; I settled with Gray in ten or fifteen days after the sale to Gallup; between the time I bought the pork of Gray and the sale to Gallup, I bought no goods; can't remember that I incurred any indebtedness; when I bought of Gray, I gave him a note for seven hundred dollars; I met with no losses between the time I bought the pork of Gray and sold to Gallup.

Q. Did you, in settling with Gray for the purchase of this pork, in order to induce him to take certain bonds in settlement of his claim, state to him that, between you and him, he had better take them, for your other creditors would not get more than fifty cents on the dollar?

Objected to by pl'ff's counsel as immaterial, and objection sustained.

I bought some goods of A. Vance Brown, in St. Paul, about that time—about $600 worth; I gave my notes for three months, which I paid before maturity; paid it by giving Brown an order on Gallup for $320, which Gallup accepted; the order was for gro-
32 ceries to the amount, and not for cash; this was one of the payments made on Gallup's first notes, and I indorsed the amount on one of the notes; Brown made this proposition to me, and I accepted it; this was after the sale to Gallup; I had no difficulty in getting Gallup's consent; this $320 was in full for the notes; I was solvent at that time; I had $8,500 in levee bonds at that time; I had been in business some time before; I cannot state whether I paid in cash any debt that became due about that time; I did pay a note of $1,500 which became due at the State Bank shortly after the sale to Gallup; I did my business with the State Bank.

Court here took a recess, and at the opening of court after the recess, the witness stated that he wanted to correct his statement,

before made, as to the presence of Mr. Allis at the time the goods were taken, on the 18th, and now states that Mr. Allis was not present at the taking on the 18th, but it was on the 15th.

The x'm being resumed, the witness stated: I did not swear, in my affidavit in the case of Derby & Day against me, that Gallup paid me about $1,000, I think; did swear that he paid me about $700 down in connexion with this sale, and that at Clearwater; this bill of sale does not include what I sold at Clearwater; I did not settle with Mr. Brown, because he threatened me with a suit of a criminal nature for obtaining goods under false pretences; I took a note from Gallup for $1,000, payable in St. Paul; part of it,
33 $320, was paid by Brown's order; there was no agreement, at the time of the sale, that Gallup should accept orders; $300 was paid in money about ten days after the making of the first order; Gallup made no objection, and paid me in money; I asked Gallup for money at the store, and he paid it to me; at the maturity of the note, he paid me the balance at the store; after the sale, I was not in the store over a dozen times during the month; after about the 13 day of October, 1859, for 7½ months I kept Gallup's books, for which, and boarding him, he paid me fifty dollars per month; since then, I have been there in no capacity; I have no interest in this suit, unless it is on my warranty on the bill of sale; I think it is customary to file a bill of sale; it has been customary for years previous; I have known of its being done within four or five years; I had placed one on file myself; I do not know of any one else doing it; I do not know that it was never done, except when given as a mortgage; nothing was said in regard to the repurchase of the goods; the $1,060, Nov. 14th, 1859, was paid at the store; some of it was paid in cash—perhaps all of it was; I told Gallup I would extend the payments on the other notes for the same length of time; I had transferred the $2,000 note to Chauncy Griggs, my father; there was also a $3,000 note; plaintiff has taken up that note; he paid $1,000 on it, last of August, 1859; the delivery of the stock at Clearwater was made about six days before this; Clearwater
34 is about sixty miles from St. Paul, on the upper Mississippi; I did not swear, in my affidavit, that both sales were made on the 18 July; I placed the bill of sale of the Clearwater stock on file at Gallup's request; I first spoke to Gallup about the sale on the seventh of July, at my store in St. Paul; Gallup had then been here two or three months; Gallup had $1,000 worth of property besides the $700 he brought with him; his property was in Connecticut; I made the proposition of sale to Gallup July seventh, and he accepted it the next day; we then went to Clearwater, and I delivered the Clearwater stock to him; the money was paid between that time and the eighteenth; I directed my clerk to take one inventory here, and when we came back I helped my clerk to finish; I did not say anything to Gallup about any debts; I did not agree to stay in the store; it was not agreed that he should pay me the proceeds of the sales of the store; I made the proposition for the purpose of going out of the business; I was present at the time the goods were

taken by the marshal; the marshal had attempted to make a levy three days previous; the marshal met me on the street; the goods first taken were retaken; I had myself nothing to do with the first retaking of the goods; Gallup requested me to see Mr. Ames; in consequence of what I said to Mr. Ames, an action of replevin for the goods first taken was commenced in a justice's court; I did
35 not make the affidavit to get the writ of replevin; I think Mr. Ames made the affidavit; I gave him the information upon which the affidavit was made; there was mentioned in the affidavit eleven barrels of pork, worth about $275; 29 sacks of coffee, worth, perhaps, $600 or 700; 74 kegs of nails, worth $4 50 per keg—about $300 in gross; about 15 ten-gallon kegs of golden sirup, worth 9 dollars per keg; fifteen boxes of star candles, worth about $180 at the time the goods were taken; I knew what goods were taken, for I saw Mr. Gere take them; Gallup told me to go to Mr. Ames and get his goods as soon as I could get them; Gallup met me in the street; I have never employed any counsel or paid any in this matter; I told Mr. Ames the goods were worth from $90 to $100; my opinion was, at that time, they were worth that; I knew the goods were worth more; I knew it then; I had no object in telling Mr. Ames they were worth $90 to $100; I did not know they could not be rebonded in the justice's court; I might have so stated the value to Mr. Ames, in order that he might commence a suit in the justice's court; the goods were probably worth about $1,800; the goods were retaken from the marshal under that justice's suit; I was not present at the retaking; I was about the American House and on the street; I was present when the goods were removed the first time; I told the marshal that the goods were Gallup's, and that I was good and had land in this State; I do not think the note I gave to
36 Gray was dated July 6th; I knew the weight and amount of the goods taken on the 18th, because I had invoiced them, and nine of the packages were broken when they were taken out.

Re-direct.

At the time I sold to Gallup, I had about $31,000 worth of property, consisting of real estate, levee bonds, &c.; the sale to Gallup amounted to 1,300 dollars; I had three hundred and twenty acres of land in Chicago county, unincumbered, worth $5 00 per acre.

Defendants' counsel here moved to strike out the last answer, because the witness had not shown himself competent to give an opinion as to the value of the property.

Motion overruled and deft's excepted.

I owned four and one-third acres in Shakopee, Scott county; I held the legal title, and there was no incumbrance on it.

What was it worth?

Objected to, on the ground that the witness had not shown himself competent to give an opinion as to the value of the property.

Objection overruled, the court holding that the owner of property was presumed to know its value, and defendant excepted. The witness answered it was worth $1,300.

I had some lots in Mankato worth $1,000; there was no incumbrance on it. I owned half of eighty acres in Sherburn county; no incumbrance on it; it was worth ten dollars per acre; owned one-half of 160 acres in Pine county, worth $4 per acre, and no incumbrance.

37 I owned $\frac{1}{2}$ of 120 acres in Benton county, Iowa. My half was worth $750. My title was all on record. There was no incumbrance on any of them, unless it be for taxes, and I think they were paid. I had a mortgage of $1,000 on 10,000 feet of lumber at St. Cloud. That mortgage was on file and matured the last of July or the first of August, 1859. Also a mortgage of $320 on land in Anoka county. Also a mortgage of $175 on lands in Pine county. I had notes with each of these mortgages. I owned them during the months of July and August, 1859. I had notes and accounts to the amount of $2,500, mostly against parties in St. Paul. I had $8,500 in city levee bonds, which I owned; they were seven per cent. bonds, interest payable semi-annually in New York; I had about $1,000 in cash at the time. The whole amount of my indebtedness at this time was $15,000. $2,000 on the Clearwater stock was to be paid in six months. $50 was paid down. I took notes at that time. They were delivered to me, and since paid.

Counsel for defendant here objected to any evidence about the Clearwater sale as immaterial.

The objection overruled.

The witness continued: One of the notes was for $939 $\frac{75}{100}$, at seven months. $61 $\frac{16}{100}$ was paid on that note Nov. 15, '59, $210 May 13, 1860, and the balance June 16, 1860. One note of $2,000 at three months. I rec'd on it, Aug. 22, $1,000. He gave me a check of $1,000 on the State bank of Minnesota, Nov. 15. He credited

38 me on my book account the balance of $1,000; I had drawn that amount on my book account. I have since paid all that indebtedness, except that of Derby & Day. Their claim was $525, or $535. Mr. Brown came to me at my boarding-house about August 1st, 1859, and said he would like to have me pay his note, as I had sold out. I told him when the note became due it would be time enough to pay it; it had 2½ months to run. He said he would take fifty cents on the dollar. I told him that proposition suited me. He said he would take an order on Gallup, and I had Gallup accept one. Gray proposed to sell me the pork at 30 days. I told him that I did not know that I could pay him within that time. I told him I was hoping to negotiate some levee bonds, and if I did I would take it. I gave my note. Two days after the note became due I settled, by giving him a levee bond for $500, and a note of Dr. Dunham's of $100, and a note of Mr. Amiden, and the balance by an order on J. B. Holms for lumber. I paid my other debts in full. I had a conversation with Derby about August 13th. He came to me and wanted to know whether I was going to pay my liabilities. I told him I was, and that his bill was not yet due; that my clerk, Wood, had bought the goods on 60 days' time. I offered Mr. Derby Chicago county land, and $300 of Ramsey county bonds. He said he would

39 look it over and let me know. He came back at night and said he would let the account stand if I would pay him. I told him I would. I have never since sold any goods out of the store on my own ac't, nor have I exercised any ownership over them on my account. I had known, previous to my interview with Mr. Ames, that he was one of Mr. Gallup's attorneys.

Q. by Mr. Ames. At the time of my making that affidavit, did you state the articles, their amount or value to me?

Obj. to as leading.

Objection overruled, and defendants excepted.

I did not state then; I only said that Mr. Gere had levied on some of Mr. Gallup's goods. The affidavit was not written by Mr. Ames. I gave no other answer to Mr. Ames than that they were worth $80 to $100. It was because Gallup was absent that I requested Mr. Ames to make the affidavit. Mr. Ames went into the justice's office, and left immediately afterwards. I was acting at the request of Mr. Gallup. had no personal interest in the matter. The goods were removed from the store, and remained away a day or two.

Re-cross-examined.

Gallup did not request me to state to Mr. Ames that the goods were worth $90 to $100; I did that of my own accord. I don't know that Dunham and Amidon were insolvent. My conversation with
40 Derby was, I think, about August 10th. I put in as a plea, in the action of Derby & Day against me, that the money was not yet due. Derby did not say to me, in our last conversation, that he would test the validity of the sale; he said he would wait.

In the conversation between Gray and yourself as to the purchase of the pork, did you state to Gray that you had bought goods in St. Louis, and paid for them?

Objected to by pl'ff's counsel as immaterial, and the objection sustained.

C. M. Gallup was then called and sworn:

I am the plaintiff in this suit. I bought goods of C. W. Grigg in July, 1859. This is the bill of sale. The amount was between $9,000 and $10,000. I also purchased a stock in Clearwater, where the amount was between $2,000 and $3,000. Griggs made me a proposition to purchase July 7th, and I accepted it July 8th, 1859. We then went up to Clearwater. I bought the goods there, and paid $50, and gave my notes for the balance July 11th, 1859. Mr. Locke was present. He was a clerk there. I gave Griggs a note of $2,000, payable in 3 months, and a note for the balance of about $900, payable in seven months. The balance was $938 and some cents. I have since paid both notes. I then hired Mr. Locke for one year,
41 and gave him one-half of the net profits for his service, and he is there still under that arrangement. There was an inventory taken there July 11th, 1859. We were about half a day taking it. I do not know whether Griggs made a settlement with Locke at that time.

Q. At that time, and afterwards, did you purchase goods for the store? And if so, when and where?

Objected to by defendants as immaterial.

Objection overruled, and defendants excepted.

Ans. I bought $200 worth, and sent them up some three or four days afterwards. I purchased for cash. I have since continued to supply that store. I returned to St. Paul and commenced taking an inventory in the store here. Griggs returned the next day. We completed the inventory in St. Paul July 18th, 1859. The bill of sale comprises the goods inventoried. Griggs and Metseff assisted me. I paid Griggs $440 cash at that time, and a note of $1,000, due in 30 days; a note of $2,000, due in 5 months; a note $1,060, due in seven months; a note of $2,000, due in 9 months; a note of $3,000, due in twelve months, with interest, and the balance of over $400 in two years' time. I returned from Clearwater July 13th. The $1,000 note I paid to Griggs. The $2,000 note was payable in New York, at the Mechanics' Bank. I paid $500 on that note at its maturity. I paid Griggs the note for $1,060. I have paid $114 on the nine months' note. The last two notes have not yet matured. After
42 the sale Metseff clerked for me until last October, at $40 per month. After the purchase I went into possession, and have so remained ever since. Did not know anything of Griggs's liabilities at the time I purchased. I had no conversation with him in regard to his liabilities. I was in possession of the stock of goods on the 15th and 18th of August, 1859. Griggs had no connexion with the stock at that time. Some of the goods in my store were taken on the 18th of August, 1859, by Wm. B. Gere, U. S. marshal. There were several there assisting in taking. The goods taken were: Six kegs of 3*d*. nails, worth $6 00 per keg; 68 kegs, worth $4 50 per keg; three ten-gallon kegs of golden sirup, 90 cents per gallon; five ten-gallon kegs of sugar-house molasses, 60 c'ts per gallon; nine boxes star candles, 40 lbs. each, 21 cents per pound, and boxes 25 cents each, making $8 65 per box; six boxes of gold-leaf tobacco, 120 lbs. in each box, at 30 cents per lb.; two boxes of diadem twist tobacco, 20 lbs. to the box, worth 40 cents per lb.; two boxes of ace-of-trumps tobacco, 20 lbs. to each box, 38 cents per lb.; two boxes of brown-dick tobacco, 130 lbs. in the two boxes, 55 cents per lb.; four chests of imperial tea, about 60 lbs. in each chest, 60 cents per lb.; thirteen chests of Young Hyson tea, about 60 lbs. in each box, worth
43 55 cents per lb.; two barrels of powdered sugar, 520 lbs., at 13 cents per lb.; six barrels of whiskey, 250 gall's, 33 cents per gal. There were no broken packages. These were wholesale jobbing prices. Retail prices would be about 25 per cent. advance. None of these goods have ever been returned.

Cross-examined.

I had been in St. Paul about two months before I made this purchase. I had before lived in Connecticut. Griggs, the last witness, is my brother-in-law. I came from Connecticut here. Griggs did

not write me to come here. I left home April 19th, and arrived here May 5th. I came here to look about. I went into Griggs's employ, in his store, shortly after I came here, and so continued until the sale. He paid me $40 per month. I did not board with him while I was his clerk. I did board with him while he was my clerk. Goods arrived at the store after I came there—quite a lot arrived. I could not tell their value. I had no conversation with Griggs about his business. I did not keep the books. I looked at the day-book to make entries. I looked into it sometimes when I did not make entries. Did not look at them to see the accounts. Looked at them to satisfy my curiosity. Metscoff resided in St. Paul. I had seen him in Griggs's store. He was employed there. I don't know
44 as to whether Locke and Griggs had before had the same arrangements that Locke and I made. I had no conversation with Griggs relating to the employment of Locke. I did not make an affidavit to enable Griggs to get an attachment dissolved. I think I made an affidavit about that time as to the ownership of the property. I did not swear in that affidavit that I had paid $1,000 down on the purchase. I think I remember better now than I did then as to what amount I paid down. I brought $700 in money with me from the east. I had some property left in Connecticut, consisting of two horses, [☞as true copy,] set of harness, a wagon, and some school books. I owed nothing. The money I brought was partly in a draft and partly in bills. When I came here I first went up the Mississippi river. I had $700 left when I came back. I then went to the store. I think I had not spent $300 when I went into the store. I cannot swear I had not. I cannot tell how much I had spent. No one advised me to file the bill of sale. I had no conversation with Griggs about filing the bill of sale. When Griggs gave me possession he gave me the key of the store. I had carried the key sometimes before. After the purchase, the clerk, Metscoff, sometimes carried the key, and sometimes I did. I can't say that Griggs did not carry it sometimes
45 after the sale. Griggs wrote the granting part of the bill of sale, and Metscoff the schedule. I have never been in the grocery business before I came to Saint Paul. I had been in some business. Question. What business? Ans. I had taught school. Griggs occasionally came to the store after the sale. I bought the goods I sent to Clearwater of Griggs, in St. Paul. The goods were sent to Clearwater before the inventory was taken of the goods here. The cash I paid Griggs I paid out of the money I brought out—what I received for my services after the payment at Clearwater and the cash payment at St. Paul. My next payment was the latter part of July. This was the order in favor of A. Vance Brown, payable in merchandise. Griggs asked me to accept the orders, and I did so. The next payment was in August sometime. The amount of the whole payment was $300; can't tell what was in cash. The payment was made from the proceeds of sales. Everything I ever paid was derived from the sale of the stock of goods. I don't recollect whether I paid the $1,000 note in cash or merchandise. I had previously accepted orders, and I applied them on the note. The next payment was on the $2,000

note given for the Clearwater sale. I paid on it $1,000 cash, Aug. 22, before its maturity. The last payment on the $1,000 note and the payment on the $2,000 Clearwater note were both made at the same time. The 5 months $2,000 note was made payable in New York at Griggs's request. I made no objection to its being made payable there. The $500 money paid on it was paid by drafts. One of the drafts was bought by Griggs at Knox & Co., and the other came from Clearwater. I don't remember that I ever said I meant to get money enough out of this suit to pay these notes. I have not paid the whole of the $2,000 note. The time of payment has been extended by Chauncy Griggs. The nine months note has been extended by Mr. Griggs. Griggs made no objection to the extension, providing I would pay interest. Both drafts, I think, were sent to New York in December—one was sent at the maturity of the note, and the other afterwards. They were sent to Chauncy Griggs. Chauncy W. Griggs sent the letters. The note was not protested at maturity to my knowledge. The next payment after that on the $2,000 note was in November. I then paid the $1,060 note. It might have been in October. I can't tell how much of the payment was cash, and how much merchandise. I applied some orders. I can't tell how many orders were drawn on me. There were about twelve orders. My next payment was made in the same month. I can't tell the amount, some cash and some orders, I made payments on the two others. I took up the Clearwater note in June, 1860. That was the one for over $900. The $1,000 note for
47 seven months was also taken up. The money paid in June was from the proceeds of wheat sent from Clearwater by Locke. While I was with Griggs as clerk, I think, Griggs did not keep the books; I think the clerk, Metscoff, kept them. After I took possession Griggs kept the books. The goods first taken were retaken. I was present at the retaking. All the goods taken first time were brought back; none of them went to Mr. Sanborns. There were about 4 men engaged in bringing back the goods. I did not direct Griggs how to proceed to get them back. I requested Griggs to employ Mr. Ames. I did not request him to commence a suit. I was acquainted with Mr. Ames, and had been introduced to him. Can give no reason why I did not go to see Mr. Ames myself, instead of sending Griggs. I knew nothing of Griggs having a note payable at the State Bank. I did not take up that note myself. I expected to pay the notes from the stock of goods. Griggs and myself had no conversation as to my means of paying the notes. I never told Griggs of the amount of property I had at the east. The business was mainly wholesale; I cannot recollect. The first or second sale after I went in I did sell a bill of goods to L. B. Martin & Co. in Aug. or Sept., between $300 and $400 worth, at 3 or 4 months. I sold a bill of goods to Atkinson, of Forest City, for $40 dollars cash; one to Joseph Linenian,
48 of St. Joseph, for $200 cash. I sold some to the Red River men. I inquired of Griggs as to L. B. Martin & Co. He said they were responsible men. I inquired of others about them. After the retaking of the goods the first time, I sold some of the coffee to

Linenian, of St. Joseph. I had sold some of the pork to Linenian & Co., and also to the man in Forest City. I did not secrete any of the goods. Griggs did not advise, between the 15th and 18th, as to the disposition of the goods. I had never employed Mr. Ames as my attorney before the commencing of the justice's suit.

Re-direct.

A book handed witness, who says: The book is the cash-book used in my business; it is a correct book; also day-book and book of original entries, also ledger, in which the accounts are posted from day to day from the day-book and journal, also a book containing an account of the bills payable and receivable. The books were then offered in evidence by the plaintiff—(objected to by defendant's counsel, and objection sustained, to which ruling of the court the pl'ff duly excepted.) The witness then testified: It is very difficult to remember the exact amount of the orders, as they were made at so many different times. I kept an account of payments in my books. I knew Griggs before I came out here. Of the $700 I brought with me, $600 was in
49 a draft of the Mystic Bank, Stonington, Connecticut; I had the draft discounted at the Bank of the State, at 3 per cent. premium. My cash sales in July after I purchased was about $100 per day; the first month's sales up to the time of taking was $2,600, of which $1,400 was cash; after the taking, the next month's sales were about $1,400. I had conversed with Mr. Ames about a week before the taking, and told him that if I wanted an attorney I should need his assistance.

Re-cross examination.

I don't recollect being asked as to whether I said I must raise money enough out of this suit to pay the notes. I saw Mr. Ames and Mr. Gregg last night. I anticipated some litigation when I spoke to Mr. Ames. The first time I employed Ames was about the 13th of August, 1859. I first spoke to him about a week before that time.

William B. Gere. I took goods from the store occupied by Gallup or Griggs, opposite the Winslow House, on August 18th, 1859. I took them under the direction of Mr. Derby and his attorney, Mr. Allis. Mr. Allis directed me to take them. On the 18th I received a bond of indemnity; the bond was delivered to me by Moulton, a clerk in Mr. Allis's office; the bond was executed by Lorpinteus & Eddy. X'd.

The witness here wished to correct his statement as to being di-
50 rected by said Mr. Derby to take the goods on the 18th, and said Mr. Derby did not direct me as to that taking; he was not then in town; it was a previous taking, on the 15th of August, 1859, to which I referred in my testimony above. Mr. Allis was acting as Derby & Day's attorney. The only direction given me by Mr. Allis, was as the attorney of Derby & Day. I took the goods under an attachment; Allis was attorney of plaintiff in the attachment. I did make a levy on 15th August, under the direction of Derby & Allis. Allis had the bond of indemnity drawn as Derby & Day's attorney. The plain-

tiff here rested his case; when defendants' counsel moved to dismiss on the part of the defendants, and also for each of them separately—on the part of the defendants, Allis, on the pleadings, on the ground that his defence in the answer is not denied in the reply as to the defendants, Charles Derby, and Franklin O. Day, and Lorenzo Allis; on the part of each of them separately, on the ground that there is no evidence to connect them with the taking.

The motion was denied, to which decision and overruling of said motion, and each of them, the defendants' counsel duly excepted.

The defendants then called George W. Prescott, who, being duly sworn, testified: I am clerk of the U. S. district court, and have possession of the records of the court, and have the files and records of th.

case of Derby & Day ag't Grigg.

51 The record offered and read in evidence. It showed, substantially, a summons issued Aug. 13th, 1859, and returned the same day by the marshal "personally served." Declaration filed, Aug. 15, 1859, on common counts for goods sold, and account annexed for $533 90. Aug. 15, rule to plead entered; also an order directing an attachment to issue on the filing of certain affidavits, on which the order was written, which affidavits were then filed, and the writ issued.

Aug'st 24, plea filed, being general issue and notice of special matter, that the goods were sold on an unexpired credit. The notice was that the goods were sold Aug. 1, 1859, at a credit of 60 days, and the term of credit unexpired. An affidavit of merit was filed, sworn to before a city alderman, on the 26th. The affidavit was sworn to before the clerk of the court September 10. Judgment, that pl'ff recover of defendant $536 71. Deft's cost, $119 $\frac{56}{100}$. May 2d, 1860, an order entered setting aside the default and judgment, and all proceedings to stand as security for plaintiff. June 4th, 1860, of general term, at Preston, judgment for plaintiff for $537 56 and costs; total, $690 70. The defendants then offered in evidence, without objection, an execution on the judgment in that case, dated Sept. 10th, 1859, and read the same to the jury, which said execution was in the words, letters, and figures following, viz:

UNITED STATES OF AMERICA,
District of Minnesota, ss:

52 *The President of the* *of America to the marshal of the district of Minnesota, greeting:*

[SEAL.]

"We command you that of the goods and chattels of Chauncy W. Griggs, in your district, you cause to be made five hundred and thirty-six dollars and seventy-one cents, ($536 71,) which Charles Derby and Franklin O. Day, partners under firm-name and style of Derby & Day, lately in the district court of the United States for the district of Minnesota as aforesaid, recovered against him for their damages which they had sustained, on account of the non-performance of certain promises and undertakings; and also one hundred and nineteen dollars and fifty-six cents, ($119 56,) which were awarded to the said Derby & Day for their costs and charges by them about their suit in that behalf

expended, whereof the said Chauncy W. Griggs was convicted, as appears to us of record; and if sufficient goods and chattels cannot be found, then you are commanded that you cause the amount of such judgment as aforesaid to be made of the lands and tenements of said Chauncy W. Griggs which he shall have had at the time of the docketing of such judgment, to wit, on the tenth day of September, eighteen hundred and fifty-nine, or at any time thereafter. And have you that money before the judge of the said court, at St. Paul,
53 within sixty days after the receipt of this execution by you, then and there to render to the said Derby & Day for their damages and costs aforesaid, and have you then and there this writ."

Witness the honorable Ressellaer R. Nelson, judge of the district of the United States for the district aforesaid, at the city of St. Paul, in said district, this tenth day of September, in the year eighteen hundred and fifty-nine, and of the independence of the United States the eighty-fourth.

GEO. W. PRESCOTT, *Clerk.*

The defendants also offered in evidence the return of the marshal on said execution, which said return was in the words, letters, and figures following:

DERBY & DAY
vs.
CHAUNCY W. GRIGGS. } U. S. dist. court, dist. of Minnesota.

By virtue of the within execution, I have this day levied upon the following described goods and chattels as the property of the defendant, to wit:

74 kegs of nails, 2 bbls. of sugar, 9 boxes of star candles, 5 kegs of sugar-house molasses, 2 boxes brown-dick tobacco, 2 boxes ace-of-trumps tobacco, 6 bbls. of whiskey, 17 half chests of tea, 3 kegs of golden sirup, 6 boxes of gold-leaf tobacco, 2 boxes of diadem twist tobacco.

WM. B. GERE,
U. S. Marshal.

SEPTEMBER 10TH, 1859.

54 "I have made out of the goods and chattels levied upon by virtue of the within execution the sum of six hundred and eighty dollars and sixty-three cents, ($680 63,) and have paid plaintiff's attorney $656 27; amount of damages and costs and costs on execution, $23 89. Total amount of execution and costs, $680 16. Balance in hands of marshal 47 cents, and of the property levied upon 4 chests of tea unsold.

"WM. B. GERE,
"*U. S. Marshal.*"

Dated Sept. 19, 1859.

The defendants also offered in evidence the receipt of Mr. Allis, the pl'ff's attorney, in that suit, indorsed on said execution for the

amount of said judgment, which said receipt was in the words, letters, and figures following, viz:

"Rec'd. St. Paul, Sept. 19th, 1859, of Wm. B. Gere, U. S. marshal, six hundred and eighty $\frac{16}{100}$ dollars in full of the foregoing execution. Lorenzo Allis, pl'ff's att'y."

The defendants then offered in evidence the writ of attachment in that case and the return of the marshal indorsed thereon, to which the plaintiff's counsel objected, unless the affidavit on which the rule that the writ should issue was founded be first offered; and the objection was sustained, and counsel for defendants excepted to the ruling, and to their being compelled to produce said affidavits. Whereupon the defendants, under the ruling of the court, produced in
55 evidence the affidavit of Charles Derby, which was in the words and figures following, to wit:

District court of the United States for the district of Minnesota.

CHARLES DERBY and FRANKLIN O. DAY, partners under the name and firm of DERBY & DAY,
against
CHAUNCY W. GRIGGS.

DISTRICT OF MINNESOTA, *ss:*

"Charles Derby, being duly sworn, says: That this affiant and Franklin O. Day are co-partners, doing business under the firm-name of Derby & Day, who are plaintiffs in the above entitled action and citizens of the State of Missouri; and that Chauncy W. Griggs, who is a defendant in said action, is a citizen of the State of Minnesota; that the above entitled action at law has been commenced in the district court of the United States for the district of Minnesota, and a summons against the said defendant has been duly issued therein. And this affiant says that the said action is to recover the price and value of certain goods, wares and merchandise, which the said plaintiffs sold and delivered to the said defendant, at his instance
56 and request, on or about the 23d day of June, A. D. 1859, at the city of St. Louis, in the State of Missouri, at and for the price of five hundred and twenty-five $\frac{23}{100}$ dollars, which were of the value of said sum of dollars, and which said goods, wares and merchandise were duly received and accepted by said defendant, and which said price and value thereof, together with the further sum of eight dollars and sixty-seven cents, expended by said plaintiffs for insurance on said goods, the said defendant then and there duly promised and undertook to pay to the said plaintiffs, when he should be thereunto afterwards requested; that, nevertheless, the said defendant has absolutely refused, and does now absolutely refuse, to pay the said sum, or any part of the same, though he has been thereunto often requested by said plaintiffs." Whereupon the said plaintiffs have brought their said action of trespass on the case upon premises, in said court, against the said defendant, and have therein laid their damages in the sum of one thousand dollars. And this affiant further says, that at the time of the sale and delivery of the

goods aforesaid, the said Griggs, defendant aforesaid, was doing business in the city of Saint Paul as grocer and provision merchant, and was engaged in buying and selling liquors, provisions and other groceries, and at the time of the said sale and delivery said
57 Griggs, by his agent, one William Wood, represented himself to said plaintiff as doing a thriving and prosperous business, as grocer and merchant aforesaid, in said St. Paul, and as perfectly solvent and sound, and abundantly able and competent to pay all his debts and liabilities, and meet punctually all his engagements and contracts; that the said plaintiff, in consideration of said representations, and believing and relying thereupon, sold and delivered to said defendant the goods and merchandise aforesaid. And this affiant further says, that soon after the sale and delivery of the aforesaid goods and merchandise as aforesaid, and on or about the 18th day of July, 1859, the said defendant, Griggs, made and executed a bill of sale, to one C. M. Gallup, of all the goods, wares and merchandise in his store and place of business, in said St. Paul, the said goods and merchandise consisting principally of groceries and provisions, and being of great value, which said goods are in market mostly cash articles, or articles sold on short time; that, nevertheless, the said Griggs sold the said stock of goods to said Gallup, as aforesaid, upon two years' time for a large portion of the purchase price, and took from the said Gallup his note or notes therefor, due two years after the date of said sale; that it is unusual, and out of the ordinary course of business, and contrary to the custom of trade, to sell the groceries and merchandise aforesaid upon so long time or
58 credit, viz., two years; that groceries are sold mostly for cash, or upon a credit not exceeding sixty days. And this affiant further says, that the said Gallup is the brother-in-law of said Griggs, and has never been in the grocery business before the execution of said bill of sale.

And this affiant further says, that he has seen and conversed with the said Griggs on yesterday, and that said Griggs represented himself to this affiant as unable to pay the said plaintiff's debt, and as unable to pay his debts generally in full; that the said Griggs does not show or assert that he has met wtih or sustained any losses in his business since the sale and delivery of the goods aforesaid to him by these plaintiffs; that the said Griggs does not show assets whereby he can pay, or expect to pay, the said plaintiff's debts, or his debts generally; that the said Griggs, within a very short time before the execution of the said bill of sale, purchased, of various parties, a large amount of groceries of great value for cash, or upon a credit of a few days, which he has not paid for, and for which he is now indebted, and represents himself as unable to pay. And this affiant further says, that the representations aforesaid, in consideration of which, and relying upon and believing which, the said plaintiffs sold and delivered to said defendant the
59 goods and merchandise as aforesaid, were false and fraudulent, and made and intended to deceive, mislead, defraud and cheat said plaintiffs; that this affiant verily believes that said bill of sale, made by said Griggs to said Gallup, is false and fraudulent, and

made to cover up said Griggs's property, and to put it beyond the reach of his creditors, and with intent to delay and defraud his creditors. And this affiant verily believes that said Griggs has assigned and disposed of his property with intent to delay or defraud his creditors; that said Griggs is insolvent, and is endeavoring to delay and defraud his creditors; and that the said plaintiffs are in danger of losing their debt unless an attachment issue against the property of the said defendant. Wherefore he prays that a warrant of attachment do issue against the property of said defendant.

CHARLES DERBY.

Sworn and subscribed before me this 13th day of Aug., A. D. 1859.

GEO. W. PRESCOTT,
U. S. Commissioner.

60 Defendants then introduced the writ of attachment and the return of the marshal thereon, in the words and figures following, to wit:

UNITED STATES OF AMERICA,
District of Minnesota.

[SEAL.] District court of the United States for the district of Minnesota.

"*The President of the United States to the marshal of said district of Minnesota, greeting:*

"Whereas an application has been made to the above-entitled court for a writ of attachment against the property of Chauncy W. Griggs, defendant, in an action commenced in said court against him by Charles Derby & Franklin O. Day; and it appearing by the affidavit of said plaintiffs that they have a cause of action against said defendant in a plea of trespass on the case upon promises, and that plaintiffs are in danger of losing their said debt, unless such writ issue, and the undertaking required by rule of this court having been filed and approved: now, therefore, you are hereby commanded to forthwith attach and safely keep all the property of the said Chauncy W. Griggs within your district, or so much thereof as may be sufficient to satisfy the demand of said plaintiffs, and the costs of this action, and that you hold the same subject to the order of this court, to abide the final judgment in this action.

61 "The plaintiffs' damages are alleged, in the summons in this action, at one thousand dollars. And of this writ make due return, upon the execution thereof, to the office of the clerk of said court.

"Witness the honorable Rensselaer R. Nelson, judge of said court, at St. Paul, in said district, this 13th day of August, A. D. 1859.

"GEORGE W. PRESCOTT, *Clerk.*"

DISTRICT OF MINNESOTA, *ss:*

I hereby certify that I have served the within writ of attachment by levying upon and taking into my possession 74 kegs of nails, 6

barrels of whiskey, 2 lbs. of sugar, 17 half-chests of tea, 9 boxes of star candles, 3 kegs of golden sirup, 5 kegs of sugar-house molasses, 6 boxes of gold-leaf tobacco, 2 boxes of brown-dick tobacco, 2 boxes of diadem twist tobacco, 2 and two boxes of ace-of-trumps tobacco, the property of the within defendant, and I have also served the within defendants and C. M. Gallup, in whose possession the property was found, each with a certified copy of the within writ of attachment.

Dated Saint Paul, Aug. 18th, 1859.

W. B. GERE,
U. S. Marshal.

62 The affidavits of Messrs. Gallup, Griggs, and one William Wood, were then read in evidence, which were respectively in the words and figures following, to wit:

United States district court for the district of Minnesota.

CHARLES DERBY & FRANKLIN O. DAY, partners as DERBY & DAY,
vs.
CHAUNCY W. GRIGGS.

Of the thirteenth day of August, in the year A. D. one thousand eight hundred and fifty-nine.

DISTRICT OF MINNESOTA, *ss:*

Chauncy W. Grigg, of the county of Ramsey, being duly sworn, says that he is the defendant in the above-entitled action; that the said action is brought by Charles Derby & Franklin O. Day, the plaintiffs therein, against him, to recover pay for certain goods, wares, and merchandise bought by this defendant of said plaintiffs, on or about the 23d day of June, A. D. 1859. Deponent further says, that at the time he did purchase the goods, wares, and merchandise aforesaid, it was expressly contracted and agreed by and between this defendant and the said plaintiffs that he should be allowed, on
63 the purchase of the said goods, a credit of sixty days from the time the same were so purchased; and that the said plaintiffs, in consideration of the said sale, would not ask, demand, sue for, or collect the price or value of the said goods, from this deponent, until after the expiration of sixty days' time from and after the 23d day of June, A. D. 1859, which was the time and when the said goods were so sold to him as aforesaid. Deponent further says, that at the time when he did so purchase the goods, wares, and merchandise aforesaid from the said plaintiffs, he made no representations to the said plaintiffs whatever as to his ability and competency to pay his debts generally, and in full; that he did not represent himself by his agent, one William Wood, or otherwise, as doing a thriving and prosperous business as grocer and provision merchant; that he has been in the habit of purchasing of the said plaintiffs, goods, merchandise, and liquors, for some time past; that, in some cases, he has paid them cash upon delivery of the goods; and that he has also often purchased good, and liquors of them, the said plaintiffs, upon credit; that he has always promptly and punctually paid and dis-

charged all his indebtedness to the said plaintiffs in full, whenever the same became due and payable; and that at the time he did purchase the goods, merchandise, and liquors, for the payment of which this is brought, they, the said plaintiffs, were willing and anxious to sell him as large a stock of goods, merchandise, and liquors,
64 as he should need, and represented themselves as perfectly willing to wait for the pay for the same for sixty days, and to sell the same to him upon the credit aforesaid, viz., sixty days, without any questions or inquiries as to his ability to pay his debts promptly, and in full; and at the time he did so purchase the said goods and merchandise, he did not, either personally or by his agent, William Wood, make any representations relative to his financial responsibility and standing. And the deponent further says, that he did, on the 13th day of July, A. D. 1858, sell and deliver to one C. M. Gallup his stock in trade, goods, and merchandise, in his store in St. Paul, and in the town of Clearwater, Wright county, Minnesota; that by the terms of said sale, the said C. M. Gallup paid to him in cash, upon delivery of the said goods, the sum of about one thousand dollars; that said Gallup gave deponent his notes for the balance of the purchase money of said stock of goods, as follows: A note for one thousand dollars, due in one month from date; a note for two thousand dollars, due in three months from date; a note for two thousand dollars, due in five months from date; a note for two thousand dollars, due in seven months from date; a note for two thousand dollars, due in nine months from date; a note for three thousand doll's, due in twelve months from date, with interest; and one note for four hundred and sixty-six dollars,
65 due in two years from date, with interest; all of said notes bearing date the said 18th day of July, A. D. 1859. Deponent further says, that a large portion of the said goods were unsalable, and consisted of remnants of an old stock, and that the sale by him to said Gallup was not an unusual proceeding—not out of the ordinary course of business; that upon the kind and quality of goods so sold to said Gallup, it is usual and customary to give a credit of from two to twelve months, and that the said Gallup came to this State for the express purpose of going into the grocery and provision business, and had been in the grocery business for a long time. This deponent further says, that he has always been ready and willing to pay the said debt of the said plaintiffs whenever the same should become due and payable, and has always so stated to them the fact, and is now ready and willing to pay to them their said debt when it shall become due and payable, and that the said sale of his goods and merchandise to said Gallup has been in all things fairly and honestly made; that the said Gallup has promptly paid all of his notes as they have become due and payable, and that in making the said sale it was not his intention to defraud the plaintiffs, or any of his creditors; but, on the contrary thereof, at the time the said sale was made, it was his intention to apply the money he should receive from
66 the notes of said Gallup which should first mature, in payment of the debt of the plaintiffs when the same should become due

and payable. This deponent further says that he has never represented himself to the plaintiffs, or to any one, that he was unable to pay all his debts with promptness and in full; that, on the contrary thereof, he has always stated to the said plaintiffs that he was ready and willing to pay their debt in full when it should become due and payable. This deponent further says, that he is the owner of large tracts of land in the counties of Chisago, Blue Earth, Scott, Sherburn, and Pine, in the state of Minnesota; that all of the same is wholly unincumbered, and is subject to levy and sale under an execution against him; that the said lands are of great value, and are worth the full sum of six thousand dollars; that said lands consist of city property and wild lands, and comprise about four hundred acres in the county of Chisago, and about two hundred acres in the other counties designated aforesaid; and that the title to the same now stands in his own name. This deponent further says, that he has paid all of his debts incurred for goods as fast as the same became due and payable, and that he is not indebted for goods in a greater sum than one thousand five hundred dollars, a large portion of which last mentioned indebtedness will not mature in a less time than
67 about two months; and that he is worth the full sum of fifteen thousand dollars over and above all his debts and liabilities, and exclusive of property exempt by law from execution; that he is perfectly competent, and is now, and always has been, ready and willing to pay and satisfy all his debts, and that the aggregate amount of all his debts and liabilities does not exceed the sum of said sum of one thousand five hundred dollars.

C. W. GRIGGS.

Sworn to and subscribed before me, August 26, 1859.

GEORGE W. PRESCOTT,
Clerk U. S. Dist. Court.

UNITED STATES DISTRICT COURT,
District of Minnesota, ss:

CHARLES DERBY and FRANKLIN O. DAY, partners as DERBY & DAY,
vs.
CHAUNCY W. GRIGGS.

Of the thirteenth day of August, in the year A. D. one thousand eight hundred and fifty-nine.

DISTRICT OF MINNESOTA, *ss:*

William Wood, of said county, being duly sworn, deposes and says, that he was the business agent and partner in the profit and loss of the defendant in the above entitled action, Chauncy W. Griggs, and that as such business agent as aforesaid he bought of the pl'ffs in the said action, Charles Derby and Franklin O. Day, on or
68 about the 23d day of June, A. D. 1859, for the said defendant, a stock of liquors, goods, and merchandise, of the agreed price

and value of five hundred and twenty-five $\frac{23}{100}$ dollars, and that the goods and merchandise so purchased as aforesaid are the same goods, wares, and merchandise, to recover the pay for which the plaintiffs have commenced the above entitled action. This deponent further says, that at the time when he did so purchase the goods, wares, and merchandise aforesaid, in consideration of such purchase, it was expressly agreed and contracted, by and between the said plaintiffs and this deponent, acting for and in behalf of the said defendant, that the said defendant should have a credit on the purchase of the said goods of sixty days' time, and that until after the expiration of sixty days from the said twenty-third day of June, A. D. 1859, the said pl'ffs should not ask, demand, sue for, or colllect of the said defendant, the said price and value of the goods, wares, and merchandise aforesaid. This deponent further says, that at the time when he did purchase of the said pl'ffs the said goods, wares, and merchandise aforesaid, he did not make any representations whatever to the pl'ffs as to the ability and competency of the said Griggs to pay his debts punctually and in full; that he did not state and represent that the said Griggs was doing a thriving and prosperous business as gro-
69 cer and provision merchant, and that he did not make any statements whatever to the said pl'ffs respecting the pecuniary responsibility and standing of the said Griggs.

Deponent further says, that he, as the agent of the said Griggs, has often purchased goods of the said plaintiffs upon credit for him, said Griggs, and that the said pl'ffs have always been paid in full therefor when their debt became due, and that the said Griggs has always professed being ready and willing to pay the said pl'ffs the amount of their debt when the same became due, viz., in sixty days after the 23d day of June, A. D. 1859.

Deponent further says, that he is well acquainted with the circumstances of the said Griggs; that said Griggs has paid all his indebtedness for goods bought by him when the same became due and payable, and that said Griggs is worth, as he is informed and verily believes, the full sum of fifteen thousand dollars over and above all his debts, and exclusive of property exempt by law from levy and sale under execution, and that the full amount of the indebtedness of said Griggs does not exceed the sum of fifteen hundred dollars, a large portion of which will not become due in a less time than about one month.

WILLIAM WOOD.

Sworn and subscribed before me August 26th, 1859.

GEORGE W. PRESCOTT,
Clerk U. S. District Court.

70 United States district court for the district of Minnesota.

CHARLES DERBY & FRANKLIN O. DAY, partners as DERBY & DAY,
vs.
CHAUNCEY W. GRIGGS.

Of the thirteenth day of August, A. D. one thousand eight hundred and fifty-nine.

DISTRICT OF MINNESOTA :

Christopher M. Gallup, of the county of Ramsey, being duly sworn, says that on or about the 18th day of July, A. D. 1859, he did purchase of Chauncy W. Griggs, the defendant in the above entitled action, certain goods, wares, and merchandise, being all the said goods and merchandise then in the store occupied by said Griggs in St. Paul, and in the town of Clearwater, in Minnesota, and that the aggregate sum paid by him to said Griggs for said goods and merchandise was about the sum of thirteen thousand four hundred and sixty-six dollars.

Deponent further says, that he paid said Griggs in cash, on the delivery of said goods and merchandise to him, about the sum of one thousand dollars, and that he gave to said Griggs his notes for the balance of the purchase money of the said goods, as follows, viz: One note for one thousand dollars, due in one month from date;
71 one note for two thousand dollars, due in three months from date ; one note for two thousand dollars, due in five months from date ; one note for two thousand dollars, due in seven months from date ; one note for two thousand dollars, due in nine months from date ; and one note for three thousand dollars, due in twelve months from date, with interest ; and one note for four hundred and sixty dollars, due in two years from date, with interest; all of said notes bearing date of said 18th day of July, A. D. 1859, which was the date of the said sale as aforesaid.

And deponent further says, that immediately after said sale he took actual and absolute possession of said goods and merchandise so sold to him as aforesaid, and has continued to keep possession of the same until the present time, and that the said Griggs has not any time since the time of the said sale, and does not now exercise any control, possession or authority over the said goods and merchandise ; and that he has paid all his notes to the said Griggs so given as aforesaid, for the purchase money of said goods, promptly and in full whenever the same have become due and payable.

Deponent further says, that the said sale was in all respects honestly and fairly conducted, and was not for the purpose of defrauding the creditors of the said Griggs ; that at the time he so purchased the said goods of said Griggs, he was unacquainted with his,
72 said Griggs's, circumstances, and did not know that he, said Griggs, was owing large sums of money to any one, and that he purchased the said goods in good faith, and for the purpose of going into the grocery business. And further deponent says not.

C. M. GALLUP.

Sworn and subscribed before me, Aug. 26, A. D. 1859.

GEO. W. PRESCOTT,
Clerk Dist. Court.

The witness then said these affidavits were made to support a motion on the part of the defendant to dissolve the attachment. There is no record of the attachment being dissolved, and it never was dissolved.

William B. Gere. I am United States marshal for the district of Minnesota, and was last summer. I was in the store referred to on

Aug'st 15, 1859; Griggs was there. I took some goods from that store by virtue of a writ of attachment issued out of the United States district court for the district of Minnesota, in the case of Derby & Day *vs.* Griggs. Griggs endeavored to resist me in the removal of the goods; I had rather a conflicting time. The store was closed against me, when I had removed a portion of the goods from the store. Griggs and Gallup resisted me; Griggs took an active part in the matter; he said the goods could not be removed. He
73 stated that he was acting for Gallup. Griggs manifested a great deal of interest in the matter; he was more active than Gallup in the resistence. The goods were finally taken and stored at Culver & Farrington's. Deputy Sheriff Turnbull demanded possession of the goods, and said he had a writ for them. I demanded to see the writ; it was a justice's of the peace writ of replevin, issued by Justice Lemay, of St. Paul, against the same defendants as in this action. I told Turnbull I should not deliver the goods under that writ, as I did not think it a legal one. I went immediately up to Culver & Farrington's, and found Culver and Sergent there with Dep. Sheriff Turnbull. There were several others at Culver & Farrington's; there was a posse of men outside demanding entrance. There was a good deal of feeling. Turnbull was very much excited. I finally prevailed on Turnbull to send for the sheriff; the sheriff came and insisted on the delivery of the goods, and I finally allowed them to take the goods, as blood had been shed, and felt it prudent to desist. Griggs was present at the taking on the 18th; he questioned my authority to take, on the ground that my process had been exhausted at the first taking. X'd. Was Mr. Allis present at the taking on the 15th?

Obj. to by defendants as immaterial, and that pl'ff had closed his case, and should not now be allowed to introduce evidence in chief, and as clearly inadmissible, unless counsel should state that it was only to test the memory, accuracy, &c., of the witness, and
74 not for the purpose of connecting Mr. Allis with the taking.

Obj. overruled and defendants excepted.

Answer. Mr. Allis came there toward evening, after part of the goods had been taken. My impression is that I had some conversation with Allis. I am not aware of any conversation with Allis in the presence of Griggs and Gallup. I don't think Allis said anything to either Griggs or Gallup. I think neither Derby nor Day were in town on the 18th August. I made a relevy on the 18th, taking part of the goods taken on the 15th August, and some others. Griggs stated to me several times that he was acting for Gallup.

Joseph Lemay. I was a justice of the peace, in the summer of 1859, at St. Paul, for Ramsey county. A suit was commenced before me, Aug. 15, A. D. 1859, in favor of C. M. Gallup, against Wm. B. Gere, Lorenzo Allis, Charles Derby, and Franklin O. Day; it was an action of replevin. An affidavit for replevin was made. I cannot now find that affidavit; I first missed the affidavit on the day the suit was discontinued. I saw Griggs there in my office the day the suit was commenced; Gallup was not there. Mr. Ames made the affidavit. I

always thought Mr. Ames took the original affidavit, until last night, when he told me he did not.

X'd. I think I had just finished making out the writ of re-
75 plevin when Gallup came in. I cannot say whether Gallup was there when Sanborn and Ames were there.

Geo. A. Emmell. I took a copy of the affidavit made by Mr. Ames in Justice Lemay's office. That is the copy I took, (referring to a paper handed witness by counsel.) X'd. I took that copy before I went to the Chicago convention.

William C. Gray. I sold Griggs pork July 6th, 1859; the sale was for $759. He gave a note at 20 days, and 3 days' grace, making the note due July 29th; the note was dated July 6th. It was not paid at maturity.

Defendants now offered to show that Griggs settled with Gray, and turned out worthless bonds and notes.

Objected to by plaintiffs as immaterial to impeach the testimony of said Griggs on collateral matters, and as evidence of his insolvency, and objection sustained and defendants excepted.

A. Vance Brown. I know Griggs, and knew him last summer. I sold him some goods about the last of June; the amount was about $600. He paid me part of it; it was a 60 days' sale. It was not paid in full; I received about 50 cents on the dollar.

Defendants here offered to show that Griggs settled with Brown, and could pay him but 50 cents on the dollar, and that not in cash, and generally the circumstances of the settlement.

76 Objection by plaintiff as immaterial, and objection sustained and defendants excepted.

J. C. Raguet. I reside in St. Paul, and am in the grocery business; have been in that business several years.

Def'ts offered to show, by this witness, that the ordinary profits charged in the grocery business at St. Paul were 25 per cent.

Obj. to by pl'ffs as immaterial, and obj. sustained and defendants excepted.

Witness shown bill of sale and schedule, &c., and asked what the lowest amount of capital required to carry on such a business as that of Gallup in St. Paul.

Objected to by plaintiff as immaterial, and obj. sustained and def'ts excepted.

Can a business, using a stock of goods like that in the schedule, be carried on by a person buying that stock and paying $700 down, the balance to be paid, $1,000 in 30 days, $2,000 in 5 months, $1,060 in 7 months, $2,000 in 9 months, $3,000 in 12 months, with interest, and $466 in two years, when the buyer has no other capital than $700 cash paid down?

Obj'd to as immaterial and incompetent. Obj. sustained and defendants excepted.

There is a custom in St. Paul as to the time given on a sale of most of the articles described in the bill of sale; the custom for most of the articles is from 30 to 60 days.

X'd. There is no special rule. It is a matter of agreement between the parties; between these limits, in 30 to 60 days.

77 Geo. T. Temple. I reside in St. Paul, and did last summer. I am a grocer and forwarding merchant, and have been for some four years. My business is of a wholesale character.

Defendants here offered to show what was the general custom of trade in the summer of 1859, at St. Paul, as to credit and terms of sale upon the class of articles mentioned in Griggs's bill of sale. Plaintiffs objected, and the court sustained the objection, and defendants excepted.

The witness then, after looking over the bill of sale, said: In July, 1859, there was a good market and demand for most of the articles mentioned in the bill of sale. Most of the goods are staples; staples are heavy goods, and they sell more readily; they sell for cash or on 30 days' time; three-quarters of the goods in the inventory are staple articles; brandies are not staple; brandies are sold on a time of from one to three months in the ordinary course of trade.

Q. Taking the whole bill together, staple articles as well as those that are not, as an assorted stock in one bill, what credit, according to the custom of trade in St. Paul, would have been given on such a bill?

Obj. to by pl'ffs as incompetent, and obj. sustained, and def'ts excepted.

Q. What would be the ordinary time given by the custom of merchants in St. Paul, 1859, upon a stock of goods of the character described in the bill of sale?

Obj. to as incompetent, and obj. sustained and defendants excepted.

Indigo and shelf goods are not staples. Between the 18th
78 of July and 18th of Aug., there was no change in the value of the articles mentioned in the bill of sale. At that time nails were worth from $3 50 to $5 per keg; from 10*d* nails upward, worth $3 50; from 10*d* down to 3*d*, were worth $5 50; 3*d* nails are the highest. Golden sirup in 10-gallon kegs was worth from 75 to 80 cents per gallon. There are different qualities of sirup, also of molasses and candles, differing in prices.

Charles Derby. X'd. I am one of the defendants in this action, and one of the firm of Derby & Day, of St. Louis. I am one of the plaintiffs in the action of Derby & Day *vs.* Griggs. I had a conversation with Griggs on Aug. 12th or 13th, 1859. It occurred partly at the American House and partly at the store of Gallup.

Question. In that conversation, did you ask Griggs, "Why did you sell out?" and did he reply, because he could not help it? Why his creditors would ruin him?

Obj. to as immaterial, and obj. sustained and exception taken.

The following series of questions were then put to the witness, each of which were objected to by pl'ffs as immaterial, and objection sustained and defendants excepted, they being the same identical series of questions asked of the pl'ffs witness, Mr. Griggs, on his cross-examination by the defendant, to wit: Did you ask Grigg what creditors? and he reply, some old debts. Did you ask, were they pushing you? And did he reply, no, but I feared they would?
79 Did you ask, would it not have been better first to have tried

to compromise with them? And did he reply, I know my own business? Did you ask if any St. Louis creditors threatened you? And did he answer, no? Did you ask, have you applied any of the proceeds of the stock you sold Gallup to the payment of your St. Louis creditors? And did he reply, no? Did you ask, don't you think it hard on those you bought staple goods of on short time, to use the entire proceeds in payment of old claims, and have nothing left? And did he reply, I could not help it? Did Griggs offer you some lands and bonds on your account? Did you ask him, what would he do for the balance he owed you? And did he reply, you would have to wait until he could work and earn it; he was young and intended to pay all he owed? Each of which questions were objected to as immaterial, and as attempting to impeach the testimony of said Griggs on his cross-examination by the defendant, on a collateral matter. The objection sustained and defendant excepted.

N. P. Langford. I was cashier of the Bank of the State of Minnesota last July and August, 1859. The bank held a note of C. W. Griggs, which matured August 29th, 1859, for $1,590. The note was paid by a check of C. M. Gallup, for $1,000, and by a certified check of $500, in Gallup's favor—check and certificate on this bank.
80 Griggs kept an account with us previous to the 18th of July. The last of July, Gallup commenced keeping an account. I think it was July 22d that Gallup opened an account. Griggs's account was closed about a week before. Defendant here rested, and pl'ff called E. A. Otis.

Griggs, myself, Sanborn, and Ames went to Lemay's office. The affidavit was drawn by me; Gallup was not there. At Ames's suggestion, the affidavit was made on information and belief. He said he had no personal knowledge of the value of the goods, or the quantity of goods taken. X'd. Ames said he did not know except upon information and belief, as to the goods. I think the affidavit enumerated the goods. The goods enumerated in the affidavit were not the same as those enumerated in the first count in the complaint. Defendants here again offered inevidence the affidavit of Mr. Ames, which was received and read in evidence, and was in the words and figures following, to wit:

STATE OF MINNESOTA,
Ramsey County:

In justice's court, Joseph Temay, justice of the peace.

CHRISTOPHER M. GALLUP
vs.
WM. B. GERE, LORENZO, AND DERBY & DAY. } Affidavit for replevin.

81 STATE OF MINNESOTA,
Ramsey County:

M. E. Ames, being duly sworn, says that Christopher M. Gallup, of said county, is the owner of, and is lawfully entitled to the imme-

diate possession of the following described goods, chattles and property: Thirteen barrels of M. O. pork, thirty sacks of coffee, eighty-eight kegs of nails, five ten-gallon kegs sugar-house molasses, five ten-gallon kegs of golden sirup, twenty-three boxes star candles, three boxes starch, four boxes candy, five boxes Shiloh tobacco, two boxes brown-dick tobacco, four boxes Diadem twist tobacco, eight boxes codfish, eight boxes ground cinamon(?) and seventeen chests of tea. And that the same have been taken, and is now unlawfully detained from the said Christopher M. Gallup, by the said defendant, Wm. B. Gere, at the city of St. Paul, in Ramsey county, in Minnesota. Deponent further says, that the above-described property was not taken from said Christopher Gallup, by virtue of any process, legally and properly issued against him. Deponent further says, that he is the attorney for the said Christopher M. Gallup, the plaintiff in this action, and that he has been informed by him, and verily believes, that the actual value of the said property is the sum of ninety-nine dollars.

M. E. AMES.

82 Sworn to andsubscribed before me, this 15th day of August, A. D. 1859.

JOSEPH LEMAY, *Justice of the Peace.*

Witness continued: I had been talked with Gallup, on Aug. 13th, in regard to the goods. Griggs and myself went down the street, and met Ames.

Re-ex: I am very confident that Gallup was not there. The words by him were not in my original draft. The last time I saw the original affidavit was in Lemay's office.

C. W. Griggs, recalled:

Was there a market in St. Paul, in July, 1859, for the stock of goods mentioned in the bill of sale? Obj. to by deft's' counsel, on the ground that the court had excluded testimony of this same character, when offered by the deft's; overruled, and deft's excepted?

Answer. There was a demand for about one-third; there was no demand for the balance, such as the buildings, glass, drays, wagons, brandies, wines, shelf goods, &c. These articles were not salable. The question whether I swore in my affidavit that Gallup paid me $1,000 was asked me by deft's' counsel. In explanation, I would say, *say*, that I stated to Mr. Otis, that the amount Gallup paid was about $700; that Mr. Otis in putting in $1,000, said that the

83 amount was not material, as he had put in $1,000 in the affidavit. The plaintiffs here closed their case.

The defendants then claimed and urged to the jury, among other things, that as to the articles of six boxes of gold-leaf tobacco, the plaintiffs could not recover in any event, as they had proved no title to them, they not being mentioned in the bill of sale. And after the counsel for the plaintiff had addressed the jury, the judge charged:

That on the question of the taking, the answers admitted the taking of the goods mentioned in the second count in the complaint, to

which the defendants' counsel duly excepted; that the denials in the answer are to be taken as qualified denials only, and to be regarded substantially as if they had said that defendants denied the allegations in the complaint, except as thereinafter specifically admitted, to which defendants' counsel then and there duly excepted. The court further charged, that there was some evidence as to the participation of Charles Derby in the taking on the 18th, and that upon this point the jury might take into consideration the affidavit made by said Derby to obtain the writ of attachment, to which the defendants duly excepted. The court further charged, that the burden of proof in a case of this kind, where the sale is attacked on the
84 ground of fraudulent interest, is in the first instance on the defendants, especially if the proof shows a sale and delivery of the property, as between the parties, to which the defendants' counsel duly excepted.

The court further charged, that as to the six kegs of gold-leaf tobacco, it was immaterial whether they were mentioned in the bill of sale or not; that they were described in the complaint, and the taking of them admitted by the answer, which was sufficient, to which defendants' counsel then and there duly excepted.

The court further charged that there was no material difference between the valuations of the witnesses Griggs and Gallup. That the court had figured up the amount of the valuations, and that they amounted to the sum of $1,576, and that if the jury believed the witnesses, and found for the plaintiff, they should find the full amount and interest, to which defendants' counsel then and there duly excepted. The counsel for the defendants then requested the court to charge that there was no evidence to show the participation of Derby and Day, or Allis, or either of them, in the taking on the 18th; which instruction was refused, and def'ts excepted. And defendants' counsel then made the same request as to each of the defendants sep-
85 arately, which was respectively refused, and defendants' counsel duly excepted. The court did charge, at the request of def'ts' counsel, that in any event only nominal damages could be recovered for the taking on the 15th. The counsel for defendant then requested the court to charge, "that if the jury believes that at the time of the pretended sale from Griggs to Gallup, there was any trust for the vendor, the sale was fraudulent and void." The court struck out the word "believe," and inserted instead thereof the words "find from the evidence," and then gave the charge as amended; and to the alteration by the court the defendants duly excepted. The court charged, at the request of the def'ts' counsel, that the continual possession of the vendor after the sale would be *prima facie* evidence of such trust. The counsel for defendant then requested the court to charge that promissory notes, though negotiable, are not a valuable consideration, so as to protect a vendee from a vender who made the sale with a fraudulent intent, on the ground of his being a *bona fide* purchaser for a valuable consideration, which the court refused, as not applicable to the case, and to which refusal def'ts' counsel then and there excepted. The counsel further requested the court to charge, that if the jury believes the sale was made by Griggs to hinder, delay,

or defraud his creditors, and Gallup knew of and participated in
86 his intent, the sale is void *in toto*. The court refused to charge as requested, but struck out the word believe and inserted instead thereof, the words "find from the evidence," and then gave the charge as altered; to which refusal and alteration def'ts' counsel excepted. The def'ts' counsel further requested the court to charge that if the jury believes that Griggs made the sale with intent to hinder, delay, or defraud his creditors, and that Gallup acted in good faith at the time of making the contract, but had notice of the fraud before the payment of any of the notes, that then the sale is void except as to an interest of Gallup, equal to the amount he had actually paid when he had that notice; which the court gave, except in striking out the word "believe," and inserting "find from the evidence;" to which alteration def'ts' counsel excepted. The defendants' counsel further requested the court to charge that uncommon stipulations or clauses in the bill of sale, should the jury believe any to be such, are badges of fraud, and that uncommon or unusual circumstances, or conduct in the words and manner of making the sale and transfer, are also badges of fraud, which the court refused and defendants excepted; the court charging that they were not per se badges of fraud, but might be considered by the jury in determining the intent, to which def'ts' counsel excepted.

The defendant Alllis then requested the court to charge
87 that if the jury believed the said defendant acted in relation to the alleged trespass only as the attorney-at-law of Derby & Day, and was in no way concerned in said taking, entering, or carrying away, except in the ordinary exercise of his duties, as the attorney for the plaintiffs, then the defendant Allis is not liable, which the court gave, but added that it was no part of the attorney's duty to give specific directions to take goods; to which qualification the defendant Allis duly excepted.

And the case being submitted to the jury they, found verdict for the plaintiff against all the defendants for $1,486 00, and defendants gave notice of a motion for a new trial.

And forasmuch as some of the foregoing matters appear of record in above case, and it is denied that they should appear, I, the judge of the district court of the second judicial district, and the judge who tried the cause, have hereunto set my hand and seal this second day of November, 1860.

[SEAL.] E. C. PALMER, *Judge.*

Endorsed: Filed Nov. 20, 1860.

R. F. HOUSEWORTH, *Clerk.*

88 At a special term of the district court of the second judicial district, held in and for the county of Ramsey, at the court-house in the city of St. Paul, on the twenty-fourth day of November, A. D. eighteen hundred and sixty.

Present, Hon. E. C. Palmer, justice.

CHRISTOPHER M. GALLUP
against
CHARLES DERBY, FRANKLIN O. DAY, and LORENZO ALLIS.

This cause coming on to be heard on the record thereof, and motion of defendants, and each of them, to set aside the judgment heretofore entered in this cause, and the verdict rendered by the jury, and for a new trial, and after hearing W. H. Peckham, for defendants, and E. A. Otis, esq., for plaintiff, it is ordered that the said judgment and verdict be vacated and set aside and a new trial granted as to the defendant Lorenzo Allis. Ordered further, as to the defendants Derby and Day the said motion be denied.

E. C. PALMER, *Judge.*

Indorsed: Filed Nov. 24, 1860.

R. F. HOUSEWORTH, *Clerk.*

89 District court, second district, county of Ramsey.

CHRISTOPHER M. GALLUP
against
CHARLES DERBY, FRANKLIN O. DAY, and LORENZO ALLIS.

You will please take notice that at a special term of this court, to be held at the court-house in the city of St. Paul, on the 24th day of November, A. D. 1860, at the opening of the court on that day, or as soon thereafter as counsel can be heard, we shall, on the part of the defendants, and of each of them separately, move to have the judgment heretofore entered in this action vacated and the verdict set aside and a new trial ordered, on the ground that the judgment is against evidence and law, and for the various errors apparent on the record thereof, and for such other or further relief as may be just in the premises.

Yours, &c.,

ALLIS & PECKHAM,
Def'ts' Att'ys.

Nov. 14, 1860.

To Messrs. GEO. L. & E. A. OTIS, with M. E. AMES, *Pl'ff's Att'ys.*

Indorsed: Due service admitted of a notice of which above is a copy, this 14th November, 1860.

M. E. AMES, & G. L. & E. A. OTIS,
Pl'ff's Atty's.

90 District court, second district, county of Ramsey.

CHRISTOPHER M. GALLUP
against
CHARLES DERBY and FRANKLIN O. DAY, impl., &c.

You will please take notice that the defendants, Charles Derby and Franklin O. Day, appeal from the order made and entered in above-entitled action, denying the said defendants, motion to set aside the

judgment therein rendered, and the verdict, for a new trial, and also appeal from the said judgment rendered by the said court in favor of the above-named pl'ff, and against these defendants and Lorenzo Allis, to the supreme court of this State.

Yours, &c.,

ALLIS & PECKHAM, *Def't's Att'ys.*

To G. L. & E. A. OTIS, Esqs., with M. E. AMES, *Pl'ff's Att'ys.*
R. F. HOUSEWORTH, Esq., *Clerk of the Dist. Court.*

Indorsed: Due service of a notice, of which the within is a copy, is admitted this 8th of December, 1860.

M. E. AMES & G. L. & E. A. OTIS,
Pl'ff's Att'ys.

Due service of the within admitted this 10th day of December, A. D. 1860.

R. F. HOUSEWORTH, *Clerk.*

91 District court, second district, county of Ramsey.

CHRISTOPHER M. GALLUP
against
CHARLES DERBY and FRANKLIN O. DAY, impl'd &c.

Whereas the above-named defendants, Charles Derby and Franklin O. Day, have appealed from a judgment rendered in above-entitled action against them and in favor of the above-named plaintiff, Christopher M. Gallup, by the said district court of the second judicial district, and from an order of said court refusing to set aside said judgment, and the verdict on which it was rendered, and to grant a new trial: Now, therefore, we, John C. Raguet and Brune Beaupre, of St. Paul, do undertake and become bond to the said plaintiff, that the appellants will pay all costs, damages, and charges which may be awarded against him on the appeal, not exceeding the sum of two hundred and fifty dollars.

JOHN C. RAGUET. [L. S.]
B. BEAUPRE. [L. S.]

DEC. 8th, 1860.

STATE OF MINNESOTA, *County of Ramsey, ss:*

Before me, this eighth day of December, A. D. 1860, personally came John C. Raguet and Brune Beaupre, to me known to be the persons described in and who executed the foregoing under-
92 taking, and severally acknowledged that they executed the same.

[L. S.]

JOHN MOULTON, JR.,
Notary Public, Ramsey Co., Minn.

RAMSEY COUNTY, *ss:*

John C. Raguet and Brune Beaupre, being each duly sworn, doth each for himself say that he is a resident of the city of St. Paul, and State of Minnesota, and is worth the sum of five hundred dollars,

over and above all his debts and liabilities which he owes or has incurred, and over and above all his property which by law is exempt from levy and sale under execution.

JOHN C. RAGUET.
B. BEAUPRE.

Sworn to and subscribed before me this 8th day of December, A. D. 1860.

[L. S.]

JOHN MOULTON, JR.,
Notary Public, Ramsey County, Minn.

Indorsed: Due service of copy of the within undertaking on us this 8th day of December, A. D. 1860, is admitted.

M. E. AMES,
and GEO. L. & E. A. OTIS,
Pl'ff's Att'ys.

Filed Dec. 10th, 1860.

R. F. HOUSEWORTH, *Clerk.*

93 State of Minnesota, dist. court, 2nd jud. dist., Ramsey county.

I, R. F. Houseworth, clerk of said court, do hereby certify and return to the honorable the supreme court, that the foregoing is a true and correct copy of the summons. Complaint separate amended. Answer of def'ts, Derby, Day & Gere. Reply to amended. Answer of def'ts, Derby, Day & Gere. Minutes of trial. Judgment case. Notice of motion to set aside judgment order. Notice of appeal and undertaking on appeal in the cause therein entitled, as appears from the original, now on file in my office, with which I have carefully compared this copy.

{ District court, Ramsey co., Minn. } In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Saint Paul, this 17th day of December, A. D. 1860.

R. F. HOUSEWORTH, *Clerk.*

Clerk's fees, on appeal, $22 80.

94 Supreme court, State of Minnesota, December term, 1860.

CHARLES DERBY and FRANKLIN O. DAY, partners as Derby & Day, (impleaded with Lorenzo Allis) appellants,
ads.
CHRISTOPHER M. GALLUP, respond't.

Pursuant to an order of this court made and entered herein at a general term thereof, on the 14th day of January, A. D 1861, and on motion of Messrs. M. E. Ames & George L. & E. A. Otis, esq'rs, of counsel for said respondent, it is now here adjudged that the judgment of the court below and the order of said court denying a new trial herein, be, and the same is hereby, in all things affirmed,

and that said respondent do recover of said appellants the sum of sixteen hundred and twenty-eight $\frac{73}{100}$ dollars, amount of judgment below, together with interest thereon amounting to fifty-six $\frac{98}{100}$ dollars, and the disbursements herein taxed at the sum of twenty-eight $\frac{95}{100}$ dollars, amounting in all to the sum of one thousand seven hundred and fourteen dollars and sixty-six cents ($1,714\frac{66}{100}$) damages, interest and disbursements, and do have execution thereof.

Dated and signed this eighteenth day of February, A. D. 1861.

Attest. A. J. VAN VOORHIES, *Clerk*,
By E. H. BURRETT, *Deputy*.

Statement for judgment.

Amount of judgment below	$1,628 73
Interest, 7 mos., at 6 p. c.	56 98
Disbursements in sup. court	28 95
	$1,714 66

95 A true copy of the judgment and decree of the supreme court in said above-entitled cause. Certified and signed by me this 18 day of February, A. D. 1861.

A. J. VAN VOORHIES, *Clerk*,
By E. H. BURRETT, *Deputy*.

Supreme court, State of Minnesota, July general term.—July 29th, 1861.

CHRISTOPHER M. GALLUP, respondent,
against
DERBY & DAY, appellants.

Upon hearing the counsel of the respective parties upon the motion herein made, on the behalf of the appellants, for a re-argument of this cause, and due deliberation thereupon being had, it is now ordered that the said motion be, and the same is hereby, denied.

SUPREME COURT, *State of Minnesota, ss:*

I hereby certify that the above and foregoing is a true and correct copy of the order of said supreme court, made and entered in the above-entitled action, on the 29th day of July, A. D. 1861, upon the motion for a re-argument of said cause.

A. J. VAN VOORHIES, *Clerk*,
By E. H. BURRETT, *Deputy*.

96 *To the honorable the chief justice and the associate justices of the Supreme Court of the United States:*

The foregoing is the return of the judges of the supreme court of the State of Minnesota, made out in pursuance of the writ of error. issued out of the circuit court of the United States for the district of

Minnesota, and directed to the judges of this court, on the third day of September, A. D. 1862, which said writ of error is hereto attached and herewith transmitted.

A. J. VAN VORHES,
Clerk of the Supreme Court, State of Minnesota.

97 STATE OF MINNESOTA,
Supreme Court :

I, A. J. Van Vorhes, clerk of the said supreme court, do hereby certify and return to the honorable the chief justice and the associate justices of the Supreme Court of the United States, that the foregoing is a true and correct copy of the judgment roll on file in the clerk's office of said supreme court, as the same appears of record, the same being the record and process in said cause ; and in addition thereto, the original writ of error served upon the judges of this court, in the cause therein entitled, together with the original citation served upon the def't in error in said writ of error named, and in pursuance thereof.

In witness whereof, I have hereunto set my hand and affixed the seal of our said Supreme Court, at the city of Saint Paul, in [SEAL.] the said State of Minnesota, this 19th day of November, A. D. 1862.

A. J. VAN VORHES, *Clerk.*

385

UNITED STATES

SUPREME COURT.

FRANKLIN O. DAY et al., Plaintiff in Error,
agst.
CHRISTOPHER M. GALLUP, Defendant in Error.

No 189

Gallup sued Derby, Day, Gear and Allis, in the Minnesota State District Court in trespass, for taking and carrying away goods. The defendants justified under certain writs of attachment and execution issued out of the United States District Court for the District of Minnesota, in a certain suit therein pending, wherein Derby and Day were plaintiffs, and one Griggs defendant; that Allis was attorney of Derby & Day, and Gear United States Marshall. That the taking was by Gear as United States Marshall, under and by virtue of the writs, and at the request of Derby & Day. The debt from Griggs to Derby & Day, the affidavits and order on which the attachment and the judgment on which the execution were issued were also plead by the defendants below, and that the property was the property of Griggs. The plaintiff below replied, denying that the property was the property of Griggs, but not denying the character of the defendants or that the taking was under federal process.

By the Minnesoto Code, whatever new matter is stated in the answer and not denied by the reply, is admitted. Minn. Comp. Statutes, p. 543, § 88.

On the trial the action was discontinued as against Gear, and the verdict against Allis was afterwards set aside. There was a verdict and judgment against the other defendants. It is not claimed that the defendants Derby & Day were guilty of any but a constructive taking as having authorized or requested the Marshall to seize under his process.

The Supreme Court of Minnesota affirmed the judgment on appeal of the plaintiff below, who then sued out this writ of error.

POINTS.

FIRST. The uncontroverted statements of the answer present a complete defense to the action.

Had the action been replevin, the facts pleaded would confessedly constitute a good defense. Freeman v. Howe, 24th Howard. p. 450. Lewis v. Buck 7th Minnesota Reports, p. 104. In replevin the gist of the action is the right to the immediate possession of the property. Lewis v. Buck, supra, and cases cited.

In trespass the gist of the action is the injury to the possession of the property. 2d Greenleaf on Ev., sec. 613; 1 Chitty's Pl., 174. It is incumbent on the plaintiff in trespass to prove a possession rightful as against the defendant. 2d Greenleaf on Ev., sec. 613.

It would seem then necessarily to follow that one who has no right to the immediate possession of property cannot be "*injured*" in that possession, and per contra that one a taking from whom is no injury to his possession, can have no right to the immediate possession of the property. That the same facts, that would show that a person, at the time of the taking, had no right to the immediate possession of the property, would also show that their possession was not *injured* by the taking. In other words that trespass and replevin are concurrent remedies, and

that what is a defense to one is equally a defense to the other.

And thus we find the rule stated "as without exception, that wherever trespass will lie, the injured party may maintain replevin." Clark v. Skinner, 20 Johns, 446. See, also, 2d Burrill's Practice, and cases cited.

The only possible case in which trespass can be maintained and not replevin, is where after the facts on which the action is based, and before the issuing of the writ of replevin, some other matter occurs which gives to the defendant a right to the possession. The case of Sharpe v. Whittenhill, 5 Hill, 576, illustrates this. But in that case had the plaintiff brought trespass he could not have recovered the value of the property, but only his special damage.

If the rule be modified so as to state that trespass and replevin are concurrent remedies in all cases where the plaintiff in trespass would be entitled to recover the value of the goods as an element in his damages, it then becomes without exception.

This becomes more apparent when we consider that after the second taking in the case of Sharpe v. Whittenhall, the plaintiff could not for that second taking have maintained trespass or trover any more than replevin.

That the facts pleaded in these cases would have been a *defense*, and would entitle the defendants to a return of the goods, had the actions been replevin was decided by this court in Freeman v. Howe, 24th Howard, 450, and conceded by the Supreme Court of Minnesota, in Lewis v. Buck, 7th Minn. reports, p. 104.

They must equally be a defense to this action. Otherwise the Marshal is decided to be entitled to the possession of goods for holding which he may, nevertheless, be sued, and damages recovered against him.

SECOND. The principle upon which the case of Freeman v. Howe was decided, necessarily decides this case.

That principle is that as between State and United States Courts, whenever an action has been commenced in one of them, the court in which it is commenced has exclusive jurisdiction over any "res" that may be in controversy and over any "question" that may arise in any stage of the litigation, whether immediate or ancillary.

The doctrine of exclusive possession of a "res" is conclusively settled in the case of Taylor v. Caryl, 20th Howard, 383. The doctrine of that case, however, was not sufficient to decide the case of Freeman v. Howe, for the reason that it was claimed in Freeman v. Howe, that if the goods belonged to a person other than the defendant in the writ, the goods would not be in the possession of the Marshal *as Marshal*, or in other words in the custody of the law; but that on the contrary the Marshal would, as to the owner, be a trespasser. This claim is unquestionably sound so far as the merits are concerned. If the goods do not belong to the defendant in the writ, the Marshal is a trespasser. If a trespasser the owner is, on universal principles, equally entitled to bring replevin or trespass. But it is decided in Freeman v. Howe, that owing to the peculiar relation of State and United States Courts, the question as to whether he is a trespasser involves a question of right and title to the property under the Federal process, which it belongs to the Federal and not State Courts to determine, 24 How., 457; that is, in other words, that in the State Courts (and vice versa where the State Court first commences the action) the property must be regarded as in the possession of the Marshal *as Marshal*—i. e. in the custody of the law. That as the question "of title to the property under the Federal process," can only be "determined" in the Federal Courts, it is incumbent on the State Courts to leave that question to them, and that in the State Courts the

2389

Marshal can never be held as a trespasser where he has in good faith under process, levied on goods *as the property* of the defendant in the writ. That whenever the Marshal would have a right to seize goods on the allegation or claim that they belonged to the defendant in his writ, his acts in such cases in the State Courts must be regarded as official, and the question as to whom the goods did belong can be litigated only in the United States Courts.

The principle was very clearly illustrated in the early case of Slocum v. Maybury, 2d Wheaton, 1.

"If" says Ch. J. Marshall in that case, "If the officer has a right under the laws of the United States to seize for a *supposed* forfeiture, the *question* whether that forfeiture has been actually incurred, belongs exclusively to the Federal Courts, and cannot be drawn to another forum." "And if the seizure be finally adjudged wrongful, and without reasonable cause, he may proceed at his election, by a suit at common law, or in the admiralty for *damages* for the illegal act."

Thus holding that a suit for damages, (this case) could not be maintained till *after* the decision of the United States Courts of the *question* of the alleged forfeiture.

In that case the law authorized the arrest and detention of the vessel on certain facts for purposes of trial and condemnation. The marshal also took the cargo. This court held, that inasmuch as if a forfeiture had been actually incurred, the marshal would have had no right to detain the cargo, therefore as to the cargo there was no question that belongled to Federal Courts to determine. The question belonging exclusively to the Federal Courts was: Had a forfeiture been made? But the right to the cargo was not involved in that question—was not affected by it, therefore the replevin of the cargo in the State Court was sustained, while it is expressly stated that had the action been for the vessel, the case would have been different.

In Freeman v. Howe, it was held, that the case did "involve a question of right and title to the property under the Federal process which belonged to the Federal, and not State Courts to determine."

The defendants in error and also the Minnesota Supreme Court endeavor to avoid the force of these cases by drawing a distinction between the forms of action, and while conceeding that replevin could not be maintained sustaining an action of trespass which they say does not disturb the actual possession of the Marshal.

This line of argument overlooks the fact that it is THE AUTHORITY TO TRY THE QUESTION OF TITLE BY THE STATE COURT, which was denied in Freeman vs. Howe, and not merely the naked right of possession to the res. That there was no possession of the res by the Marshal *as Marshal*, unless on the assumption of the exclusive authority of the Federal Court to decide the question of title.

If the defendant in error desired to bring his action of trespass in the State Court, the proper way for him to have done was first to have litigated the naked right of property in the Federal Court. If successful in that, he then could have brought his action either of trespass or replevin.

Such a course would not have been new. It was successfully pursued in the case of Gelston vs. Hoyt, 3d Wheaton, 46. In that case the *question* of forfeiture was first litigated in the Federal Court and decided in favor of the claimant. The claimant then brought trespass in the State Court and recovered. And in that case, p. 313, 314, this Court directly decides that *trespass* cannot be maintained in the State Court in a case involving a question of which the Federal Courts have exclusive jurisdiction till after the decision of such question by the Federal Court. The same doctrine of exclusive authority to try certain questions is also maintained in

Wallace vs. McConnell, 13 Peters, 136; Peck vs. Jenness, 7 Howard, 612; U. S. vs. Booth, 21st Howard, 506.

Thus this Court has decided in Slocum vs. Mayberry, that *replevin* in the State Court will not lie against a Marshal for any taking where he has the right to seize for an alleged forfeiture until the question of forfeiture has first been decided by the Federal Court—in Gelston vs. Hoyt that neither will *trespass* lie in the State Court until after the decision of the question of forfeiture by the Federal Court. In Freeman vs. Howe that the question of title to goods under the federal process is a question belonging to the Federal Courts to determine, and that *replevin* in the State Courts will not lie until after its decision—does it not necessarily follow that in the case at bar the action is prematurely brought, and that it cannot be maintained until the question of title has first been decided in the Federal Courts.

THIRD. If the action of trespass were allowed, every evil would follow that in Freeman v. Howe, was stated as a consequence of permitting replevin. The Marshal would retain the bare possession of the goods; but if he were liable to be mulcted in damages in the State Court for the taking, it is not perceived what practical benefit that possession could be to him.

Either action equally deprives the Federal Court of jurisdiction over, or the power to decide the very question over which this court, by the decision in Freeman v. Howe, has claimed exclusive jurisdiction.

FOURTH. The judgment should be reversed.

WHEELER H. PECKHAM,
Of Counsel for Plaintiff in Error.

Wm. C. Bryant & Co., Printers, 41 Nassau Street, cor. Liberty, N. Y

Supreme Court of United States.

Franklin O. Day, et al, Plaintiff in Error, *against* Christopher M. Gallup, Defendant in Error.	Reply plff. in error

I.

As to the jurisdiction of this Court:

The justification of the defendants below of the alleged trespass was under a certain *writ of attachment* issued out of the United States District Court.

See answer of plaintiffs in error, pages 5 and 6.

The allegations as to the judgment and execution are merely supplementary and were *after* the taking.

Now, none of the allegations *of that answer, with respect to the attachments,* are denied in the reply. The reply simply denies the *validity* or *legality* of the judgment and execution alleged in the answer, but not a word as to the attachment.

Here, then, is a valid defence under the authority of an United States Court and Marshall ADMITTED ON THE RECORD, and which the State Court *must have overruled, in order to have rendered the judgment they did.*

And "when a fact is stated in a pleading under the Code, which constitutes of itself a defence, *the intent to rely* on it as such is a necessary inference."

Bridge *vs.* Payson, 5 Sand., 210.

And the Court is bound to give judgment according to the pleadings without any demurrer being interposed. A judgment entered upon a trial in the face of an admission by the pleadings, showing that there ought to be no such judgment, would be erroneous.

Id., p. 217.

See, also, Van Valen *vs.* Lapham, 13 Howard, New York Practice Reports, p. 246.

The Code of Minnesota being substantially like that of New York, the above cases apply.

Now, under the case of Crowell *vs.* Randall, 10 Peters', 368, it certainly does, in this case appear, by clear and necessary intendment, that the question must have been raised and was decided.

Aside, too, from its being raised by the pleadings, it was raised although unnecessarily on the trial.

On page 25, fol. 55, the plaintiffs in error objected and excepted to being obliged to produce in evidence more than the simple writ of attachment, thus claiming that the simple taking under United States process *was in itself a defence*, and without producing the affidavits, &c., on which it was founded, which would, of course, be necessary to sustain a defence founded only on fraud.

Van Etten *vs.* Hurst, 6 Hill, 311.

II.

As to Derby and Day being mere volunteers there is no such feature in the case. The whole actual taking was by the U. S. Marshal. Derby and Day were claimed to be guilty *only* constructively, as being plaintiffs in the suit, directed the levy and received the benefits. But it is certain that if the *act is justified* by the *actual* doer, it must be equally justified by the constructive doer.

But even were it not so, the protection in this case is the protection of the party. The *plaintiff* has the right to have the *question* of liability of the goods decided in the Court of his choice. In Peck *vs.* Jenness and Wallace *vs.*

McConnell it is expressly decided that "the *right of the plaintiff*" to have every question that can be raised in the case decided in the Court of his choice "cannot be taken away."

Therefore this defence belongs even more to Derby and Day than it does to the Marshall.

III.

As to the point that the case in the U. S. Court was finished when this case was commenced, it is a mistake in point of fact. This case was commenced 26th of September, 1859. Final judgment in the U. S. Court case was rendered June 4th, 1860. Record page 23, fol. 52.

But if the fact were so it would be immaterial; because it is *the right* of the plaintiff to have *the question* of the liability of those goods to his attachment decided in the forum of his choice. The authority to *try* that question belongs to the U. S. Court alone. As in Gelston *vs.* Hoyt and Freeman *vs.* Howe, *no* action can be maintained in the State Court until *after* the U. S. Court has decided that question. If the claimant has neglected to have that question of authority first decided by the U. S. Court, he must fail in his action in the State Court. Revenue cases, prize and admiralty cases illustrate this position. In addition to cases cited on principal brief see:

Novion *vs.* Hallett, 14 Johns., 273 and 16 Johns., 327.

IV.

The rest of the brief of defendant in error is as applicable to an action of replevin as of trespass, and cannot prevail unless the Court overrule the decision in Freeman *vs.* Howe.

WHEELER H. PECKHAM,
Of Counsel for Plff. in error.

2391

IN THE SUPREME COURT.

CHARLES DERBY & FRANKLIN O. DAY
vs.
CHRISTOPHER GALLUP.

No. 76.

In Error to the Supreme Court of Minnesota.

The Defendant in error brought an action of trespass *de bonis asportatis*, in the District Court of Minnesota, against Wm. B. Gere, —— Allis, and the Plaintiffs in error, (Derby & Day.) Before trial, and judgment in the case was discontinued as to Gere and Allis, and verdict and judgment against the present Plaintiffs in error only. The case was carried by writ of error to the Supreme Court of the State, in which the judgment was affirmed, and it is now before this Court on a writ of error to that State Court.

The facts are substantially as follows:—Chauncey W. Griggs, of St. Paul, Minnesota, in the year 1859, purchased a lot of goods from the said Derby & Day, residing in St. Louis, Missouri. The goods were purchased on credit. Before the term of credit had expired, Griggs sold out his stock in trade to Gallup. Shortly after this, and before the debt was due, they sued Griggs in the District Court of the United States for the District of Minnesota, by process of attachment, and attached part of the stock in trade which had been sold and transferred by Griggs to Gallup. Gere was the U. S. Marshal; Allis the Plaintiff's attorney.

The goods so taken were replevied by Gallup; and a few days thereafter the Marshal seized other goods of Gallup's, under the same attachment; and Gallup brought this action against all four of the parties.

The case went on in the Federal Court to trial and judgment, and Derby & Day recovered, sued out execution,

levied it on the goods so attached, and made their money. The judgment was rendered 10th September, 1859, and execution issued same day, (p. 23,) and returned satisfied 19th September, 1859, (p. 24.)

On the 1st April, 1860, the Defendants filed their answers (p. 8) to the *complaint* of Gallup, which appears to have been filed 26th September, 1859, (p. 4,) so that at the time this suit was brought there was no case touching the goods taken under the attachment pending in the Federal Court.

On the 18th June, 1860, and before a jury was sworn in the case, it was discontinued as to Wm. B. Gere, (Marshal, &c.) On the same day a jury was sworn, (p. 9,) and on the 20th June they returned a verdict for the Plaintiff, with interest and costs, making in the whole $1,628.73, (pp. 10 and 11.)

On the trial of the cause, and before the Defendants had offered any evidence, and before there had been any proof of a suit pending in the Federal Court, or of an attachment issued out of such Court, or that the said goods had been taken under process, the Defendants' counsel moved to dismiss on the part of the Defendants, and also for each of them separately, (p. 23,) which was refused. The Defendants then gave in evidence the substance of the suit in the Federal Court, of Derby & Day against Griggs, (p. 23,) and assailed the sale from Gallup to Griggs as fraudulent.

Numerous exceptions seem to have been taken to the rulings of the Court touching questions of evidence, and the instructions given by the judge to the jury; *but in no part of the record does it anywhere appear that the authority of Gere, as Marshal, to take the goods, was drawn in question.*

This is substantially the case, and upon this case the Defendants in error will maintain:

I.

That this Court has no jurisdiction of the case.

II.

That if it has jurisdiction, and if the question of the authority of these Plaintiffs in error under the process issued by the Federal Court to take the said goods was drawn in question, and the State Court decided against such authority, this action was properly brought and the Court was right.

Williams *vs.* Nones—12 Wheat., 117.—It must appear by the record that one of the questions described in the 25th section of the Judiciary Act *necessarily arose* and *was decided* by the State Court.

3 Pet., 292.—Or if it appears from the record that an Act of Congress *must* have been drawn in question.

2 Pet., 380.—Or if it appears in fact that it was drawn in question, though the record does not in terms declare it was.

10 Pet., 368.—Or if it appears *by clear and necessary intendment* that the question *must have been raised and was decided.*

Coon *vs.* Gallaher—15 Peters, 18 But.—It is not sufficient that one of the questions mentioned in the 25th section *was involved* in the cause, and might have been decided. It must appear in terms, or by necessary implication, that it was decided, and decided against the right claimed.

13 Pet., 157.—And when the record shows that the State Court might have disposed of the case, and, for aught that appears in the record, did decide it without deciding any question under an Act of Congress against the Plaintiff in error, this Court has no jurisdiction.

Neilson *vs.* Lagow, 7 How., 772.—It clearly appears that the State Court decided against a title set up and relied on under the authority of the Secretary of the Treasury.

Smith *vs.* Hunter, 7 How., 738.—Where it does not appear upon the record that any right, or title, or exemption, was set up under the constitution or laws of the United States, this Court has no jurisdiction.

Armstrong et. al. *vs.* the Treasurer of Athens Co., 16 Pet., 285.—In order to give this Court jurisdiction under the 25th

section of the Judiciary Act of 1789, it must appear on the record itself. * * This must be shown: first, either by express averment, or by necessary intendment, in the pleadings in the case.

Or, secondly, by the direction given by the Court, and stated in the exception.

Or, thirdly, when the proceeding is according to the law of Louisiana, by the statement of facts, and of the decision, as usually made in such cases by the Court.

Or, fourthly, it must be entered on the record of the proceedings in the appellate Court, in cases where the record shows that such a point may have arisen and been decided—that it was, in fact, raised and decided—and this entry must appear to have been made by the order of the Court, &c.

Or, fifthly, in proceedings in equity, it may be stated in the body of the final decree of the State Court from which the appeal is taken to this Court.

Or, sixthly, it must appear from the record that the question was necessarily involved in the decision, and that the State Court could not have given the judgment or decree which they passed without deciding it.

Hickie *vs.* Starke, 1 Pet., 94.—The treaty or act need not be specially pleaded, but the record must show a complete title under it "*relied on*, and that the Court below decided against its validity.

McKinney *vs.* Carroll, 12 Pet., 16.—It is not sufficient that a State Court *may have* decided that a State law was valid; it must appear they did so decide.

This is a summary of the leading cases; and, tested by these rules, the Plaintiffs in error have no standing in this Court.

The only part of the record from which it could possibly be inferred that the question was raised and decided is at the top of p. 23, where a motion was made to dismiss the complaint, on the ground that *there is no evidence to connect Derby & Day with the taking.*

2401

III.

If this Court has jurisdiction, and if the question of the authority of these Plaintiffs, under the process issued by the Federal Court to take the said goods, was drawn in question, and the State Court decided against such authority, there is no error in that ruling.

1. They were mere volunteers, if they assisted in taking the goods.

If the goods were the property of Gallup, the Marshal himself could not be protected by his writ.

Sewell's law of Sheriff, 243, citing Dalton and numerous authorities; and Ackworth *vs.* Kemp, Doug. 110.

It follows that these parties acting with him would have been subject to an action.

2. (*a*) The State Court had either exclusive or concurrent jurisdiction both of the parties and the subject matter, unless that jurisdiction is concluded by the fact that the property was taken under process issued by the Federal Court.

The title to the property had not been called in question in that Court, and there had been no decision respecting it. The return of the execution in that case was dated 19th September, 1859, (p. 24.) The complaint in this case was filed 26th September, 1859, (p. 4.) The Federal Court, therefore, at the time this suit was brought, had no possession of or control over the parties, or the subject matter.

The case between the Plaintiffs in error *vs.* Griggs, in the Federal Court, had been decided; the money made on the execution, and the debt satisfied.

(*b.*) But it is supposed the jurisdiction of the State Court was concluded by the fact that the alleged trespass was committed by the Marshal in execution of process; and these parties assisting him, their liability will depend on his; and as at that time the Federal Court had jurisdiction, this action could not be brought in the State Court. The case of Freeman *vs.* Howe, 24th How., 450, is relied on.

That was an action of replevin: this of trespass. They are sometimes, not always, concurrent remedies.

The principle on which that case rests, and which is the basis of all preceding cases in this Court on that point, is that when the possession or control of person or property has been taken by a Federal Court in the exercise of its jurisdiction, it will retain that possession and control to the conclusion of the case. It follows that all questions touching the rightfulness of such possession are to be decided by it. This Court, in the case cited, has suggested the remedies for persons claiming such property, and not already parties to the suit.

But neither the reasons given by the Court in the decision of those causes, or any one of them, nor the judgments themselves, can be read to exclude the State Courts from providing remedies for injuries received by individuals from acts of the officers of the Federal Court done *colore officii*, especially after the case between the parties in the Federal Court is at an end, and the rights of the parties so injured have not been drawn in question and decided in the Federal Court.

If the person or property is taken under an attachment, or under a proceeding *in rem*, the retention of possession is necessary to the due exercise of the jurisdiction of the Federal Court; if it is taken under an execution the process is returnable into that Court, and that Court claims the exclusive right to determine all the questions in the cause.

If an action had been brought by Gallup in the Federal Court against these Plaintiffs, it cannot be doubted or denied that he might have maintained it pending the suit between them and Griggs in that Court. Or he might have resorted to one of the remedies suggested in Freeman vs. Howe, to raise the question of the right of property.

The first, because they were citizens of different States; the last, because that Court had the custody and control of the property in dispute in another suit, between other parties.

This last reason fails when that litigation is ended; and Gallup's rights, postponed as to the forum pending that suit, revive when the property is no longer in the custody or control of the Federal Court, and his right to it has not been called in question and decided in that Court.

The result is that the jurisdiction of the State Court is suspended while the preperty is held in the custody of the law; it revives as soon as that custody ceases.

If this be so there is no error in the record from the State Court.

But if this be not so, still the remedy by the action of trespass or case may be proceeded with, even while the property taken by the Marshal is in the custody of the Federal Court.

It is wholly immaterial where the property is, or if it has been destroyed, these actions may be prosecuted. The suits are between different parties, for different causes of action. The validity of the process of the Federal Court is in no wise called in question; its exclusive jurisdiction over the parties and the subject matter in controversy between them, is not interrupted; its process from the impetration of the writ to the satisfaction of the judgment, is unimpaired. If these actions could be brought and maintained in that Court, between proper parties, leaving the custody of the property where it was first put by the law, so here the State Court having concurrent jurisdiction, must be allowed to proceed with it, leaving the property still in the custody of the law.

So far as we have been able to discover, from a careful examination of the decisions of this Court, it never has said a State Court has no jurisdiction to enquire into trespasses, *vi et armis*, committed by Marshals under a pretence of process.

The tests are: is the subject matter of the two suits the same? can both suits be carried on without a conflict of authority between the two Courts? If so, they may well be prosecuted in the two *fori* at the same time. It [illegible]

then the Court which first obtained jurisdiction of the parties and the subject matter will retain it to the end.

Smith *vs.* McIver, 7; Wheat, 532; Shelby *vs.* Bacon, 10; How., 56.

In the Federal Court a party is pursuing his remedy to recover a debt. That is the subject matter of the suit. As part of the process in that suit, property is taken and is to be held in the custody of the law until that cause is finally disposed of, unless that Court shall in the meanwhile order it to be released. It will not tolerate the interference of any other Court with property so situated.

In the State Court having concurrent jurisdiction with the Federal Court, the action is brought, not to recover possession of the property thus held in the custody of the law in the Federal Court, but to recover damages for the unlawful taking. The cause of action, or subject matter of this suit, is the injury sustained by the party from whom that property was taken under color of process. The process may be *omni exceptione major;* and yet the taking under the color of that process may be a trespass. Either Court may have, and must have, the power to decide this last question without infringing on the jurisdiction of the other. The property is in the custody of the law, to enable that Court to decide, not the right of property, but the demand in that suit.

No question as to the authority of the Federal Court to issue the process is involved, directly or indirectly. If it shall appear that the property was subject to that process, the marshal is justified. The process is good; but that does not afford protection to him for taking the property of another, for abusing the process. He is not sued *qua* Marshal, but as trespasser. He sets up his defence *qua* Marshal, and it fails, and that is a question which a State Court is competent to try, equally with a Federal Court.

See Booth *vs.* Colbath, 7 Minna., 310.

JOS. H. BRADLEY,
For the Deft. in Error.